# N Indra a/p Nallathamby (administratrix of the estate and dependant of Kugan a/l Ananthan, deceased) v Datuk Seri Khalid bin Abu Bakar & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCVC-7–01 OF 2012
VT SINGHAM J
26 JUNE 2013

*Police — Duties of police — Breach of statutory duty — Detainee beaten to death by policemen whilst in detention — Systematic series of assault and battery of deceased during detention until his death — Abuse of remand warrant — Attempt to cover up incident — Vicarious liability — Whether tortfeasor and his superior officers liable for deceased death*

*Tort — Damages — Exemplary damages — Award against police — Detainee beaten to death by policemen whilst in detention — Systematic series of assault and battery of deceased during detention until his death — Whether conduct of police officer outraged and flagrantly disregarded deceased's safety*

*Tort — False imprisonment — Arrest — Detention for investigation for theft of motorcar — Remand warrant granted by magistrate — Detainee beaten to death by policemen whilst in detention — Whether amounting to abuse of remand warrant — Whether detention rendered unlawful — Whether false imprisonment by police established — Whether s 32(1) of the Police Act 1967 applicable*

*Tort — Misfeasance in public office — Police officer — Detainee beaten to death by policemen whilst in detention — Systematic series of assault and battery of deceased during detention until his death — False entries made in police station diary and false information given by superior officer in attempt to cover up — Failure to initiate disciplinary action against tortfeasors — Whether superior officers liable for misfeasance*

*Tort — Vicarious liability — Liability of government — Tort of servants — Police — Detainee beaten to death by policemen whilst in detention — Systematic series of assault and battery of deceased during detention until his death — Tortfeasor named as co-defendant — Whether tortfeasor went on a frolic of his own — Liability of government in failing to monitor interrogation of deceased — Whether vicarious liability established*

The plaintiff who was the mother and the administratrix of the estate and dependant of Kugan a/l Ananthan, ('the deceased') claimed damages against the defendants for negligence and/or breach of statutory duties for unlawfully having killed the deceased. In was pleaded that the first defendant and/or other police personnel had wrongfully and intentionally assaulted and beat the deceased resulting in the death of the deceased whilst the deceased was detained by the police at the Taipan Police Station. The plaintiff also claimed for damages against the defendants for misfeasance of public office, assault and battery, false imprisonment, aggravated, exemplary, vindicatory and special damages. According to the plaintiff, the deceased was arrested by the police on 14 January 2009 and the defendants did not inform the plaintiff as to where the deceased was being held. On 20 January 2009 at or about 9am, the plaintiff was informed by a police officer that the deceased had died whilst in the police custody. On 21 January 2009 the first defendant, being the Chief Police Officer of Selangor at the material time had issued a false explanation to the media on the deceased's cause of death. He had alleged that 'the deceased had asked for a glass of water and then collapsed and died'. It was contended that the first defendant had made attempts to cover up the real cause of death of the deceased and/or issued statements calculated to exonerate the police from liability with the full knowledge that the death was unlawfully caused by the members of the police force. The body of the deceased bore extensive marks of beating and other severe physical trauma. The first autopsy showed that there were '22 categories of external wounds' and the cause of death was stated as 'pulmonary edema'. Upon the release of the first autopsy report, the first defendant again issued a public statement that the deceased had died 'due to water in lungs'. The first autopsy report was inconsistent with the external marks of abuse on the body of the deceased. The pathologist, Dr Abdul Karim bin Tajudin was subsequently found guilty of professional misconduct by the Malaysian Medical Counsel in preparation of the first autopsy report and had been reprimanded. A second autopsy report conducted upon the request of the plaintiff showed that there were '45 categories of external injuries' on the body of the deceased and a wide range of internal injuries. The second autopsy report concluded that the cause of death of the deceased was due to 'acute renal failure due to rhabdomyolysis due to blunt trauma to skeletal muscles'. The second defendant was found guilty under s 330 and s 331 of the Penal Code ('Code') for causing grievous hurt to the deceased. As such, the plaintiff claimed that the defendants were liable for misfeasance in the public office and claimed for damages under s 7 and 8 of the Civil Law Act 1956.

**Held**, allowing the plaintiff's claim:

(1) There had been a systematic series of assault and battery which had proceeded and continued over the period of the deceased's detention and possibly had continued after the assault and battery on the deceased until his death. The grievous injuries on the deceased could not have been

caused by D2 only but possibly by other officers and policemen who had access and assigned to interrogate the deceased in accordance with their duty roaster for which the defendants must be found liable (see para 24).

(2) D1 who was then the Chief Police Officer of Selangor and D3 as the OCPD of Subang Jaya, had to take responsibility and could not be permitted to plead ignorance or disclaim knowledge and place the entire blame for the cause of the deceased's death on D2 (see para 25).

(3) The entries recorded in the station diary between 15 January 2009 till 16 January 2009 and thereafter from 16 January 2009 till the deceased died on 20 January 2009 was a fabrication and a dishonest act on the part of the officers or policemen who had recorded in the station diary that the deceased was in good health. It was a criminal offence for which no action had been taken against the officers or policemen. Merely framing a criminal charge against D2 alone for an offence under s 330 and s 331 of the Code did not reflect the reality of what had happened to the deceased during the period he was in police custody, especially, when considering the grievous injuries found on the deceased and the inconsistent entries as found in the station diary (see para 26).

(4) The deceased was detained for investigation in respect of theft of a motorcar pursuant to a lawful remand warrant granted by the magistrate. However, the remand warrant was abused where the deceased who was taken in police custody pursuant to the lawful remand warrant was beaten and assaulted by police officers or policemen. Consequently, the detention was unlawful and resulted in false imprisonment as the purpose of the remand warrant had been abused. There was a cause of action for false imprisonment which the defendants were liable to the plaintiff. Section 32(1) of the Police Act 1967 did not assist the defendants as the acts committed was not done in obedience of the remand warrant issued by the magistrate (see para 27).

(5) The evidence given on the defendants' behalf, indicating the circumstances leading to the death of the deceased was not truthful, an exaggeration and unreliable and was a case of not disclosing the true events of what had occurred during the time of the deceased's detention at Taipan Police Station till his death. On the totality of the evidence, there was sufficient evidence, be it direct or circumstantial to find that the plaintiff had established her claim on the balance of probabilities against the defendants, for which D4 and D5 must be vicariously liable (see para 50).

(6) In obtaining the confession from the deceased, D2 had used an improper method or means of obtaining the confessions for his superior which was for D1, D3 and D4. There was closeness of the connection between the duties which D2 was instructed to perform and which resulted in the

death. D4 and D5 were vicariously liable. D2 was not engaged 'on frolic of his own' or not acting as an employee or had departed from the course of his duty (see para 56). A

(7) The conduct of D2 was an irresponsible behaviour as such that the level of conduct outraged and flagrantly disregarded the deceased's safety meriting condemnation and punishment by way of awarding exemplary damages (see para 77). B

**[Bahasa Malaysia summary**

Plaintif yang mana merupakan ibu dan pentadbir estet dan tanggungan Kugan a/l Ananthan, ('si mati') menuntut ganti rugi terhadap defendan-defendan untuk kecuaian dan/atau percanggahan kewajipan statutori dengan secara salah membunuh si mati. Adalah diplidkan bahawa defendan pertama dan/atau kakitangan polis yang lain dengan salah dan sengaja mengecam dan memukul si mati dan mengakibatkan kematian si mati semasa si mati di dalam tahanan polis di Balai Polis Taipan. Plaintif juga menuntut ganti rugi terhadap defendan-defendan untuk misfeasans keatas pejabat awam, kecaman dan serang sentuh, pemenjaraan salah, ganti rugi terlampau, teladan, wajar dan khas. Menurut plaintif, si mati telah ditahan oleh polis pada 14 Januari 2009 dan defendan-defendan tidak memberitahu plaintif di mana si mati ditahan. Pada 20 Januari 2009 pada atau sekitar 9 pagi, plaintif telah dimaklumkan oleh pegawai polis bahawa si mati telah meninggal dunia semasa di dalam tahanan polis. Pada 21 Januari 2009 defendan pertama, sebagai Ketua Pegawai Polis Selangor pada masa matan telah mengeluarkan penjelasan palsu kepada pihak media akan sebab kematian si mati. Dia mendakwa bahawa 'the deceased had asked for a glass of water and then collapsed and died'. Adalah dihujahkan bahawa defendan pertama telah membuat cubaan untuk menyelindung sebab sebenar kematian si mati dan/atau mengeluarkan kenyataan untuk melepaskan polis daripada liabiliti dengan pengetahuan sepenuhnya bahawa kematian tersebut dengan salah telah disebabkan oleh ahli-ahli pasukan polis. Mayat si mati menunjukkan banyak kesan-kesan pukulan dan trauma fizikal teruk yang lain. Autopsi pertama menunjukkan terdapat '22 categories of external wounds' dan sebab kematian dinyatakan sebagai 'pulmonary edema'. Selepas pengeluaran laporan autopsi pertama, defendan pertama sekali lagi mengeluarkan kenyataan awam bahawa si mati telah meninggal dunia 'due to water in lungs'. Laporan autopsi pertama adalah tidak konsisten dengan kesan penderaan luaran pada badan si mati. Ahli patologi, Dr Abdul Karim bin Tajudin selanjutnya didapati bersalah untuk salahlaku profesional oleh Penasihat Perubatan Malaysia dalam penyediaan laporan autopsi pertama dan telah mendapat teguran. Autopsi kedua yang dijalankan atas permintaan plaintif menunjukkan bahawa terdapat '45 categories of external injuries' pada badan si mati dan kecederaan dalaman yang meluas. Autopsi kedua menunjukkan bahawa kematian si mati adalah disebabkan oleh 'acute renal failure due to rhabdomyolysis due to blunt trauma to skeletal muscles'. C D E F G H I

Defendan kedua didapati bersalah di bawah s 330 dan 331 Kanun Keseksaan ('Kanun') kerana menyebabkan kecederaan parah kepada si mati. Oleh itu, plaintif mendakwa bahawa defendan-defendan adalah bersalah untuk misfeasans ke atas pejabat awam dan menuntut ganti rugi di bawah s 7 dan 8 Akta Sivil 1956.

**Diputuskan**, membenarkan tuntutan plaintif:

(1) Terdapat turutan sistematik kecaman dan serang sentuh yang mana bermula dan berlanjutan di dalam tempoh penahanan si mati dan kemungkinan berterusan selepas kecaman dan serang sentuh terhadap si mati sehingga kematiannya. Kecederaan parah pada si mati tidak mungkin disebabkan oleh D2 sahaja tetapi mungkin juga dilakukan oleh pegawai-pegawai lain dan pegawai polis yang mempunyai akses dan yang ditugaskan untuk menyoal siasat si mati mengikut jadual tugasan mereka yang mana defendan-defendan seharusnya didapati bersalah (lihat perenggan 24).

(2) D1 yang mana pada masa itu merupakan Ketua Pegawai Polis Selangor dan D3 sebagai OPCD Subang Jaya, memikul tanggungjawab dan tidak patut dibenarkan untuk memplid kejahilan aau menafikan pengetahuan dan menyalahkan sebab kematian si mati sepenuhnya pada D2 (lihat perenggan 25).

(3) Pemasukan data yang direkod di dalam diari balai di antara 15 Januari 2009 sehingga 16 Januari 2009 dan kemudian dari 16 Januari 2009 sehingga si mati meninggal dunia pada 20 Januari 2009 adalah pemalsuan dan perbuatan tidak jujur pada pihak pegawai-pegawai atau pegawai polis yang mana telah membuat rekod di dalam diari balai bahawa si mati berada dalam kesihatan yang baik. Adalah kesalahan jenayah di mana tiada sebarang tindakan diambil terhadap pegawai-pegawai atau pegawai polis. Dengan rangka tuduhan jenayah terhadap D2 seorang untuk kesalahan di bawah s 330 dan 331 Kanun tidak menggambarkan realiti apa yang terjadi kepada si mati sepanjang tempoh dia di dalam tahanan polis, terutamanya, apabila mempertimbangkan kecederaan parah pada si mati dan pemasukan data yang tidak konsisten seperti yang dilihat di dalam diari balai (lihat perenggan 26).

(4) Si mati telah ditahan untuk soal siasat berkenaan dengan kecurian sebuah kenderaan mengikut waran reman yang sah yang diberikan oleh majistret. Walau bagaimanapun, waran reman telah disalah guna di mana si mati telah dibawa ke dalam tahanan polis mengikut waran reman yang salah telah dipukul dan diserang oleh pegawai polis. Selanjutnya, tahanan adalah tidak sah dan membawa kepada pemenjaraan palsu memandangkan tujuan waran reman telah disalah guna. Terdapat kausa tindakan untuk pemenjaraan palsu di mana defendan adalah bersalah

kepada plaintif. Seksyen 32(l) Akta Polis 1967 tidak membantu defendan-defendan memandangkan tindakan yang dilakukan bukanlah dibuat disebabkan kepatuhan kepada waran reman yang dikeluarkan oleh majistret (lihat perenggan 27).

(5) Keterangan yang diberikan bagi pihak-pihak defendan, menunjukkan keadaan yang membawa kepada kematian si mati adalah tidak benar, diperbesarkan dan tidak boleh diguna pakai dan merupakan kes di mana kejadian sebenar tentang apa yang terjadi semasa penahanan si mati di Balai Polis Taipan sehingga kematiannya tidak dikemukakan. Pada keseluruhan keterangan, terdapat keterangan yang mencukupi, sama ada jelas atau ikut keadaan mendapati bahawa untuk menunjukkan bahawa plainitif telah membuktikan tuntutannya atas imbangan kebarangkalian terhadap defendan-defendan, yang mana D4 dan D5 harus didapati bersalah secara vikarius (lihat perenggan 50).

(6) Dalam memperolehi pengakuan daripada si mati, D2 telah menggunakan cara yang tidak betul untuk mendapatkan pengakuan untuk orang atasannya iaitu D1, D3 dan D4. Terdapat hubung kait rapat di antara tugas-tugas yang mana diarahkan untuk dilakukan oleh D2 dan yang mana menyebabkan kematian. D4 dan D5 secara vikarius adalah bersalah. D2 tidak 'engaged on frolic of his own' atau bertindak sebagai majikan atau menyimpang daripada course kewajipannya (lihat perenggan 56).

(7) Tindakan D2 adalah tingkah laku tidak bertanggungjawab yang mana tahap tindakan 'outraged' dan secara terlampau tidak mengendahkan keselamatan si mati yang memeritkan pengecaman dan hukuman melalui ganti rugi teladan (lihat perenggan 77).]

**Notes**

For a case on statutory duty, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) para 1374.

For cases on arrest, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 845–851.

For cases on exemplary damages, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 251–257.

For cases on liability of government, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2177–2185.

**Cases referred to**

*Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368, HC (refd)

*Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145, FC (refd)

*Ajab Singh v The State of Uttar Pradesh* AIR 2000 SC 3421, SC (refd)

*Ali Tan & Ors v Mazlan Bidin & Anor* [2012] 4 CLJ 736, CA (refd)
*Alfred Templeton & Anor v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202, HC (refd)
*Amiable Nancy* 3 Wheat, 546 (1818) (refd)
*Anderson v Carlvert* 24 TLR 399 (in 1908) (refd)
*Asghar v Ahmed* (1984) 17 HLR 25 (refd)
*Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975, HL (refd)
*Bala Krishnan Appala Naidu v Ketua Inspektor Prabakaran Shanmugam & 2 Ors (No 2)* [2011] 2 CLJ 890, HC (refd)
*Barwick v English Joint Stock Bank* (1866-67) LR 2 Ex 259 (refd)
*Bell v Midland Railway Company* 10 CB (NS), 284 (1861) (refd)
*Benson v Frederick* (1766) 3 Burr 1845 (refd)
*Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor (Yap Burgess Rawson International Sdn Bhd, third party)* [2006] 6 MLJ 768, HC (refd)
*Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329, CA (refd)
*Chan Chin Ming v Lim Yoke Eng* [1994] 3 MLJ 233, SC (refd)
*Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352, HC (refd)
*Common Cause, A Registered Society v Union of India & Ors* [1999] 4 LRI 12, CA (refd)
*Drane v Evangelou* [1978] 1 WLR 455, CA (refd)
*Dreyfus v Peruvian Guano Co* 42 Ch D 66 (refd)
*Dunlea v A-G* [2000] 5 LRC 566, CA (refd)
*Emblen v Myers* 6 H&N 54 (1860) (refd)
*Esah bte Ishak (a mother and legal dependant of Nazri bin Ahmad Ramli, deceased) & Anor v Kerajaan Malaysia & Anor* [2006] 6 MLJ 1, HC (refd)
*Fertilizer Corporation Kamgar Union v Union of India* AIR 1981 SC 344, SC (refd)
*Ghotovi Sema v State of Nagaland and Ors* (1996) ACJ 996 (refd)
*Goh Choon Seng v Lee Kim Soo* [1925] AC 550, PC (refd)
*Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621; [1999] 5 CLJ 335, HC (refd)
*Green v DB Group Services (UK) Ltd* [2006] EWHC 1898, QBD (refd)
*Harris v Digital Pulse Pty Ltd* (2003) 44 ALSR 370; [2003] NSWCA 10 (refd)
*Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, SC (refd)
*Huckle v Money* (1763) 95 ER 768 (refd)
*Ilkiw v Samuels* [1963] 1 WLR 991, CA (refd)
*Janata Dal v HS Chowdhary & Ors* AIR 1993 SC 892; AIR 1996 Cal 181, SC (refd)
*Keppel Bus Company Ltd v Sa'ad bin Ahmad* [1974] 1 MLJ 191, PC (distd)
*Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)
*Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122; [2001] 3 All ER 193, HL (refd)

*Lai Hie Hua v Lim Teong Yu & Anor* [2008] MLJU 856, HC (refd)
*Lai Kim Hon & Ors v PP* [1981] 1 MLJ 84, FC (refd)
*Lamb v Cotogno* (1987) 164 CLR 1, HC (refd)
*Lloyd v Grace, Smith & Co* [1912] AC 716, HL (refd)
*Lo Foi v Lee Ah Kong & Ors* [1997] MLJU 310; [1998] 1 CLJ 244 Supp 259, HC (refd)
*Madjai bin Sanusi v Pengarah Imigresen Johor & Ors* [2000] 5 MLJ 116; [1999] 7 CLJ 569, HC (refd)
*Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653, CA (refd)
*McMillan v Singh* (1984) 17 HLR 120, CA (refd)
*Mediana, The* [1900] AC 118 (refd)
*Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147, SC (refd)
*Merest v Harvey* 5 Taunt, 442 (1814) (refd)
*Millington v Duffy* (1985) 17 HLR 232, CA (refd)
*Neo Chan Eng v Koh Yong Yoe* [1960] MLJ 291 (refd)
*New South Wales v Lepore* (2003) 195 ALR 412 (refd)
*Nilabati Beraha v State of Orissa and Another* AIR 1993 SC 1960; (1995) 2 East Cri C 281, SC (refd)
*Osman v United Kingdom* (1998) 29 EHRR 245 (refd)
*P-V Kapoor and Anor v Union of India and Anor* (1992) Cri LJ 128, HC (refd)
*Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62, HL (refd)
*Polland v John Parr & Sons* [1927] 1 KB 236, CA (refd)
*R (on the application of Middleton) v West Somerset Coroners* [2004] 2 AC 182, HL (refd)
*R v Inner West London Coroner ex p Dallaglio* [1994] 4 All ER 139, CA (refd)
*Ragbir Singh v State of Haryana* AIR 1980 SC 1087, SC (refd)
*Rajeshkanna a/l Marimuthu v Tn Hj Abd Wahab Hj Kassim (Pengarah Penjara, Johor Bahru, Johor)* [2004] 5 MLJ 155; [2004] 5 CLJ 328, HC (refd)
*Ramanoop v A-G of Trinidad and Tabago* [2005] 2 WLR 1324, PC (refd)
*Riga Sdn Bhd v Haji Awang Sepian Haji Awang Joini* (Kuching High Court, Civil Suit No 22–218–1998–11) (refd)
*Rookes v Barnard* [1964] AC 1129, HL (refd)
*S Ananda and Ors v State of Tamil Nadu rep by its Secretary to Government, Department of Home, Chennai-9 and Others* [2012] 5 MLJ 772, HC (refd)
*Saheli, A Women's Resources v Commissioner of Police* AIR 1990 Dehli 513, SC (refd)
*Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269, FC (refd)
*Sangaiyya v The State of Tamil Nadu* [2011] 1 MLJ 280, HC (refd)
*Shri DK Basu, Ashok K Johri v State of West Bengal, State of UP* [1996] SC 2177, SC (refd)
*Siddhu v State of UP* (2002) Cri LJ 4546 (refd)
*Smith v Streatfeild* [1913] 3 KB 764 (refd)

A *Sunil Batra v Delhi Administration* (1978) Cri LJ 1741, SC (refd)
*Suzana bt Md Aris (claiming as administrator of the estate and a dependant of Mohd Anuar bin Sharip, deceased) v DSP Ishak bin Hussin & Ors* [2011] 1 MLJ 107, HC (refd)
*Takong Tabari v Government of Sarawak & Ors* [1996] 5 MLJ 435, HC (refd)
B *Templeton & Ors v Low Yat Holdings Sdn Bhd* [1993] 1 MLJ 443, HC (refd)
*Thangavelu v Chia Kok Bin* [1981] 2 MLJ 277 (refd)
*Thomson v Commissioner of Police for the Metropolice* [1999] 2 All ER 762 (refd)
*Three Rivers District Council and Others v Bank of England (No 3)* [2001] 2 All ER 513. HL (refd)
C *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71 (refd)
*Wilkes v Wood Huckle v Money* (1763) loft, (1763) 2 Wills KB 205 (refd)
*XL Petroleum (NSW) Ptd Ltd v Cultex Oil (Australia) Pty Ltd* (1985) 155 CLR 1 (refd)
*Yap Ami & Anor v Tan Hui Pang* [1982] 2 MLJ 316, FC (refd)
D *Yew You & Anor v Mash Poay Loh & Anor* [1970] 1 MLJ 57, FC (refd)

**Legislation referred to**

Civil Law Act 1956 ss 5, 6, 7, 7(3)(ii), (iv)(d), 8
Criminal Procedure Code s 117
E Federal Constitution art 5, Part II
Government Proceedings Act 1956 ss 5, 6
Lockup Rules 1953 r 3
Penal Code ss 95, 302, 304, 330, 331, 395, 397
Police Act 1967 ss 20, 32(1), 74, 78

F *Sivarasa Rasiah (Latheefa Koya and Bani Prakash with him) (Edwin Lim Suren & Soh) for the plaintiff.*
*Azizan Md Arshad (Nur Aqilah Ishak with him) (Senior Federal Counsel Attorney General's Chambers) for the first, third, fourth and fifth defendants.*
*Ramesh Sivakumar a/l R Ramaveloo (Mohd Nor Md Deros with him) (Ramesh & Loo) for the second defendant.*
G

**VT Singham J:**

H **[1]** By the amended statement of claim dated 10 May 2012 ('encl 27'), the plaintiff who is the mother and the administratrix of the estate and dependant of Kugan a/l Ananthan, deceased ('the deceased') claims for damages against the defendants for negligence and/or breach of statutory duties for unlawfully having killed the deceased on 20 January 2009. In the alternative, the first
I defendant and/or other police personnel had wrongfully and intentionally assaulted and beat the deceased between 14 January 2009 to 20 January 2009 resulting in the death of the deceased whilst the deceased was detained by the police at the Taipan Police Station. The plaintiff has also claimed for damages against the defendants for misfeasance of public office, assault and battery, false

imprisonment, aggravated, exemplary, vindicatory and special damages. The plaintiff had pleaded, inter alia, and briefly, as follows:

(a) The deceased was arrested by the police on 14 January 2009 and the defendants did not inform the plaintiff as to where the deceased was being held by the police.

(b) On 20 January 2009 at or about 9am, the plaintiff was informed by a police officer that the deceased had died whilst in the police custody.

(c) On 21 January 2009 the first defendant, being the Deputy Commissioner of Police and the Chief Police Officer of Selangor at the material time had issued a false explanation to the media on the deceased's cause of death. He had alleged that *'the deceased had asked for a glass of water and then collapsed and died'.* (Emphasis added.)

(d) The first defendant had made attempts to cover up the real cause of death of the deceased and/or issued statements calculated to exonerate the police from liability with the full knowledge that the death was unlawfully caused by the members of the police force.

(e) The body of the deceased bore extensive marks of beating and other severe physical trauma.

(f) The first autopsy was conducted by the Pathologist Dr Abdul Karim bin Haji Tajudin, of the Serdang Hospital. Based on the autopsy report ('the first autopsy report') he had found that there were '22 categories of external wounds' and the cause of death was stated as 'pulmonary edema'.

(g) Upon the release of the first autopsy report, the first defendant again issued a public statement that *the deceased had died 'due to water in lungs'.* (Emphasis added.)

(h) The first autopsy report is inconsistent with the external marks of abuse on the body of the deceased. The pathologist, Dr Abdul Karim bin Tajudin was subsequently found guilty of professional misconduct by the Malaysian Medical Counsel ('MMC') in preparation of the first autopsy report and has been reprimanded. The charge and the findings of the Malaysian Medical Council is reproduced:

MAJLIS PERUBATAN MALAYSIA
(MALAYSIAN MEDICAL COUNCIL)
Kementerian Kesihatan Malaysia
(Ministry Of Health Malaysia
Blok D, Tingkat 3,
Jalan Cenderasari
50590 Kuala Lumpur

Tel: 03-2694 7920
03-26985077/22798100
Sambungan 417/411
Faks: 03-2693 8569
Emel: admin.mmc@moh.gov.mv
Laman
Sesawang: http: //www.mmc.gov.mv

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Ref. No: (101) dlm MPM 5141 (S)
Date: 18 July 2011

PROF DrAbdul Karim bin Hj. Tajudin
Jabatan Perubatan Forensik
Hospital Serdang
Jalan Puchong
43000 Kajang
Selangor Darul Ehsan.

Dear Prof,

IN THE MATTER OF REGULATION 31 OF THE MEDICAL REGULATIONS 1974 PURSUANT TO SECTION 29, MEDICAL ACT 1971 IN ERSPECT OF AN ENQUIRY BY THE MALAYSIAN MEDICAL COUNCIL ON A COMPLAINT AGAINST PROF DR ABDUL KARIM BIN HJ. TAJUDIN, NRIC NO. 490507-08-5539, (APC NO. 1567/2011, FULL REGISTRATION NO. 22783 DATED 13/03/1979)

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The above matter refers.

1. Prof Dr Abdul Karim Bin Hj Tajudin, I have to inform you that the Malaysian Medical Council had conducted a due enquiry under the Medical Regulations 1974, enacted under the Medical Act 1971, on a complaint against you by Madam N. Indra Nallathamby dated 13/03/2009.

2. After delibetaring on the proceedings of the enquiry as well as your submission and plea of mitigation, the Council at the close of its enquiry on 11/07/2011 had found you guilty of infamous conduct in a professional respect under Section 29(2)(b) of the Medical Act 1971 on the charge framed against you as follows:

*CHARGE:*

That you, Prof Dr Abdul Karim Bin Hj Tajudin had neglected and disregarded ypur professional responsibilities by failing to conduct a proper examination and preparing and honest report as a government pathologist or forensic pathologist entrusted with performing an autopsy on the body of the deceased who died while in custody, as required under the item No. 4 of the Guidelines of the Malaysian Medical Council in relation to 'Ethical Implications of Doctors in Conflict Situations'.

3. Consequentially, by virtue of the power vested on the Council in

respect of disciplinary punishment under Section 30 of the Medical Act 1971, the Council had decided to impose the following punishment:

To order that you, PROF DrAbdul Karim Bin Hj. Tajudin, (NRIC) No. 490507-08-5539), (APC No. 1567/2011), (Full Registration No. 22783 dated 13/03/1979) be reprimanded under Section 30(iii) of the Medical Act and to direct the Registrar accordingly.

4. The effect of the foregoing direction and order is tht unless you exercise your right to appeal to the High Court Section 31 of the Medical Act 1971, within ONE (1) month from the service of this letter, this Order, will be endorsed against your name on the Register.

Thank You.

Yours Faithfully,

s.g.d.

(DATO' DR HASAN BIN ABDUL RAHMAN)

President

Malaysian Medical Council

(i) Being dissatisfied with the first autopsy report, the plaintiff had appointed Dr Prashant N Samberkar of Pusat Perubatan University Malaya (PPUM) to conduct a second autopsy. Based on the second autopsy report ('the second autopsy report'), Dr Prashant N Samberkar had found that there were '45 categories of external injuries' on the body of the deceased and a wide range of internal injuries. He had concluded that the cause of death of the deceased was due to 'acute renal failure due to rhabdomyolysis due to blunt trauma to skeletal muscles'.

For easy reference and completion, both the post mortems reports are reproduced:

HOSPITAL SERDANG
JALAN PUCHONG
43000 KAJANG
SELANGOR DARUL EHSAN

Telefon: 03-8947 5555
Faks: 03-8947 5050
Kawat: MINHEALTH,
KUALA LUMPUR
Teleks: MA 28102

---

Ketua Jabatan: DrAbdul Karim bin Haji Tajudin KMN, PJK,

PJCM.D. (Indon], D.C.P. (Lond), D.M.J. (Path). A.M.M

Pakar Perunding Kanan Patalogi dan Forensik

Tarikh: 24 Februari 2009

Tetuan Naraendran & Suria

Peguambela & Peguamcara

No. 3A, Persiaran Ara Kiri

Lucky Garden, Bangsar

59100 Kuala Lumpur

| | |
|---|---|
| NO. PENDAFTARAN HOSPITAL | :SD00182405 |
| NO. BEDAH SIASAT | :P0033/2009 |
| No. LAPORAN POLIS | :USJ 8 Rpt:764/09 |

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Pada hari ini, 21 Januari 2009 jam 3.00 petang bertempat di Bilik Mayat Hospital Serdang, saya DrAbdul Karim bin Haji Tajudin bertugas sebagai Pakar Perunding Kanan Patalogi dan Forensik, Hospital Serdang atas permohonan Pegawai Penyiasat ASP Mohamad Zainal bin Abdullah telah memeriksa jasad seorang lelaki dewasa berbangsa India, yang identitinya seperti berikut:

| | | |
|---|---|---|
| Nama | : | Kugan a/l Ananthan |
| Umur | : | 22 tahun |
| No. Kad Pengenalan | : | 860830-43-5645 |
| Tarikh dan waktu kematian | : | 20/01/2009 @ 11.50 pagi |
| Tempat kematian | : | Tingkat 3, Pejabat Bahagian Siasatan Jenayah Berat, Balai Polis Taipan, IPD Subang Jaya |

Mayat dikenalpasti oleh:

a) Polis : Mohamad Zainal bin Abdullah
No. Pangkat : G/15429

b) Waris : N. Indra a/p P.Nallathamby
No. K/P : 681204-10-6410
Hubungan : Ibu

*RIWAYAT KES*

Jasad telah tiba di Jabatan Perubatan Forensik, Hospital Serdang pada pukul 6.00 petang 20/01/2009 dan pukul 23:40 malam waris meminta untuk melihat mayat tersebut tetapi sebenarnya tidak dibenarkan oleh saya. Namun, bilik mayat telah dibuka untuk membenarkan ibubapa melihat/ mengecam/ mengenal pasti si mati tetapi tidak diketahui jumlah berapa ramai orang (waris) telah masuk beramai-ramai melihat si mati. Peristiwa ini telah berlanjutan hingga ke jam 2.30 pagi 21/01/2009 di mana mayat disimpan semula. Apa yang berlaku sewaktu 'waris' melihat jasad tersebut adalah di luar pengetahuan saya.

*HASIL PEMERIKSAAN ADALAH SEPERTI BERIKUT:*

PEMERIKSAAN LUARAN

Jasad seorang lelaki dewasa berketurunan India dalam keadaan kaku mayat dan lebam mayat yang sempurna. Jasa tersebut belum terbentuk tanda-tanda pembusukan awal. Beratnya 76kg dan tingginya 176cm. Rupa parasnya adalah sesuai dengan usia yang dinyatakan. Rambutnya pendek, berjambang dan bermisai. Terdapat terkeluar buih putih di mulut bercampur dengan sedikit darah. Alat kelamin tidak berkhatan. Terdapat jangkitan tinea cruris di scrotum dan daerah inguinal.

Terdapat tangkal benang di pinggang.

Terdapat tatu matahari pada lengan atas kanan luar.

Catatan: Waktu kematiannya sesuai seperti yang dinyatakan.

PAKAIAN

Baju lokap polis lengan pendek berwarna oren yang seperti telah dikoyak di belakang.

Seluar boxer lokap polis berwarna oren.

PERLUKAAN DAN KECEDERAAN

Terdapat perlukaan dan kecederaan seperti berikut:

1. Parut lama melintang di dahi kanan berukuran 2.2 x 0.5cm, 4cm di atas kening kanan.
2. Parut abrasi baru (<1 minggu) pada bahu kanan 5.5 x lcm.
3. Kesan abrasi baru dan sedikit luka dan keropeng yang sedang menyembuh melintang mengelilingi pada pergelangan tangan kanan, lebih ketara di sebelah belakang tangan meliputi 10 x 4 cm (catitian: kesan itu sesuai dengan kesan gari yang dipasang berulang-kali)
4. Kesan lebam dan calaran yang bergaris sejajar antara satu sama lain berbagai ukuran dan juga berbagai arah di daerah bahu kiri belakang yang berukuran 3 x 1cm (paling kecil] 4 x 3, 7 x 1, 6 x 1, 5 x 1cm, 7 x 1cm dan 7 x lcm.

5. Kesan lebam dan calaran yang sama lengan atas kiri luar 16 x 0.8cm.

6. Kesan pergelangan tangan kiri seperti luka, (3) kesan lebih ke pergelangan tangan, darjat ada yang mengelupas, mengelopeng dan lebam, berbagai umur, meliputi daerah 11 x 6cm (Catitan: Seperti kesan gari yang diaplikasikan berulang kali).

7. Lebam bertompok-tompok pada paha kanan berbagai ukuran.

8. Lebam bertompok pada betis kanan.

9. Parut baru di tulang keting kanan depan 7 x 1.5cm

10. Lebam pada Rusuk kiri pada garis ketiak lengah 9 x 8cm, 29cm di bawah bahu kanan.

11. 2 x kesan lebam bergaris dan sejajar antara satu sama lain pada dinding perut kiri atas 15 x 1.5cm dan 14 x 1.5cm.

12. 3 x lebam yang agak kehitaman berbentuk 'U' bergaris sejajar (umur dalam 2–3 hari) di dinding perut kiri atas dan rusuk kiri bawah, meliputi daerah 6 x 6cm, 7 x 5cm dan 7 x 6cm.

13. Kesan abrasi melintang dalam di tengkuk 4 x 2cm.

14. 2 x lebam bentuk lengkung bergaris pada belakang bahu kanan hingga belikat kanan kiri 11 x 0.8cm dan 14 x 0.8cm.

15. 12 x luka calar abrasi berbentuk 'V' dengan berbagai darjat kedalamannya di belakang tengkuk di antara 2 belikat dengan ukuran lebar 6cm, lcm, 7cm, 4cm, 0.8cm, 5cm, 3cm, 0.8cm, 6cm, 6cm, 3cm dan 3cm.

16. 4 x Lebam berbentuk 'V' di belikat kiri ukuran 6 x 0.4cm, 5 x 5cm, 8 x 5cm, 5 x 5cm.

17. Luka calar melengkung di belakang ketiak kiri 6 x lcm.

18. 25 x Luka calar berbentuk 'V' dan berbagai darjat kedalaman di bahagian tengah belakang dengan berbagai ukuran 2x3x1,3x2x 1cm.

19. 8 x Lebam berbentuk 'V' di bahagian pinggang 5 x 5 x 1cm, hampir semuanya sama ukuran.

20. Lebam pada pelipat lutut kiri 4 x 3cm.

21. Luka abrasi di pergelangan kaki kiri bahagian luar 8 x 7cm.

22. Luka abrasi di pergelangan kanan bahagian dalam 4 x 4cm.

Tidak terdapat kecederaan lain yang ketara.

PEMERIKSAAN DALAMAN

*Kepala dan Leher Subgaleal hemotama.*

Otak keadaan baik 1360g.

*Leher*

Otot-otot leher normal. Arteri karotid baik dan tiada kesan lebam. Tulang hyoid dan rawan thyroid juga dalam keadaan baik.

*Dada*

Lebam pada bahagian dalam kulit dada di tengah dada.

Paru-paru kanan: 662g, kiri: 622g. Congestion and Oedematous.

Jantung normal 248g. Sangkar dada baik, pleura baik.

*Abdomen*

Perut kosong. Hati normal. Limpa normal. Organ-organ lain diperiksa satu persatu dan dalam berkeadaan baik.

*Tulang*

Tidak ada patah tulang dalam dan tulang-tulang panjang.

SIASATAN

Histopatologi

Hasil pemeriksaan histopatogi terdapat dua potong tisu paru-paru 30 x 20 x 18mm dan 35 x 21 x 20mm. 2 s tisu telah diambil untuk mewakili paru-paru tersebut. Di bawah mikroskop, terdapat tisu paru-paru yang penuh sesak dengan sel-sel darah di dalam saluran darah dan di dalam ruang-ruang alveolus terdapat cecair warna kemerahan (eosinophilic) dan tidak kelihatan septum-septum alveolus.

Ada di antara bronchioles menunjukkan ada kelenjar-kelenjar mucus yang hyperplasia dan mengelilingi bronchioles. Terdapat infiiltrasi sel-sel mononucleus. Tidak kelihatan sel-sel inflammasi akut atau deposit selaput hyaline. Hasil dari pemeriksaan di atas hanya menunjukkan paru-paru yang congenstion dan juga oedema.

RINGKASAN DAN KESIMPULAN

Seorang lelaki dewasa India yang tidak diketahui menderita apa-apa penyakit dan juga tidak ditemukan penyakit biasa yang boleh menyebabkan kematiannya, telah menderita beberapa luka akibat dipukul benda tumpul

pada seluruh badannya. Hasil pemeriksaan darah tidak menunjukkan dadah atau alkohal dalam badannya. Mulutnya berbuih adalah disebabkan oleh sambap dan congestion paru-paru. Ini boleh menyebabkan kematiannya.

Penyebab kepada kongesi dan sembab paru-paru tidak dapat ditentukan dengan bedah siasat.

SEBAB KEMATIAN

5. a) Pulmonary oedema

BERKHIDMAT UNTUK NEGARA

s.g.d.

(DR ABDUL KARIM BIN HJ TAJUDIN)

No K/P: 490507-08-5539

Pakar Perunding Kanan Patologi dan Forensik

Ketua Jabatan Perubatan Forensik

Hospital Serdang

The internal and external injuries as stated in the second post mortem report being:

PUSAT PERUBATAN UNIVERSITI MALAYA

University Malaya Medical Centre

(sebelum ini dikenali sebagai Hospital Universiti)

ALAMAT: LEMBAH PANTAI, 59100 KUALA LUMPUR

TELEFON: 03-79494422

FAX NO: 60379562253 E-mail: ummc@uhkl.edu.my

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AUTOPSY REPORT OF KUGAN A/L ANANTHAN

| | |
|---|---|
| Autopsy No: A26/09 | Police Report No: — |
| Registration No: 23877855 | Police Station: — |
| Coroner's Case No: — | |
| I.C. No: 860830435645 | Sex: Male |
| Marital Status: Single | Age: 22 Yrs |
| Occupation: Employed in a vehicle-towing | |
| Company:- | |
| Ethnic group: Indian | |

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DrPrashant N Samberkar, carried out an autopsy examination on the body of Mr Kugan A/L Ananthan on 25-01-2009 commencing at 0925 hours at the Mortuary, University Malaya Medical Centre, Kuala Lumpur.

The request for the second post-mortem examination and the body was identified by:

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Name: N. Indra A/P Nallathamby

I.C. No:- 681204-10-6410

Relationship: Mother of the deceased

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*EXTERNAL EXAMINATION*

The body was that of a big-sized, well-nourished, muscular, adult Indian male, 182cm in length and 81kg in weight. The body was dressed in a branded (Egypt tailor) light brown jeans, a branded (Rodeo club — L size) orange, red, white and black coloured V2 sleeve shirt and a light green coloured underwear.

Rigor mortis was minimally present. Postmortem hypostasis was present at the back.

There was no decomposition changes noted.

The complexion was dark coloured. The head hair was black and 04 cms in length.

The eyes were blurred/opoque. The ears, mouth and nose did not show presence of any blood or other body fluid. The nose showed cotton plugs. The external genitalia appeared normal. The penis was normal. The anus and the area around the anus were soiled with feacal matter. The nail beds and the toes appeared normal and were yellow-stained (due to application of turmeric powder). The toes were pale. The upper and lower jaws had natural set of teeth and were in good state of health.

Identifying features:

1. Identification tag bearing the name of the deceased.
2. A tattoo on the outer surface of right arm coloured red and black.

Signs of recent medical therapy: Nil. However, a 1st post-mortem examination had been conducted on the 21st January 2009, at Hospital Serdang.

EXTERNAL MARKS OF INJURIES:

Please refer to additional sheet.

INTERNAL MARKS OF INJURY:

Extensive hemorrhaging is present with-in the fatty tissues and the muscles of the upper trunk, lower trunk, both upper limbs and both lower limbs. Findings are consistent with injuries on the external surface.

INTERNAL EXAMINATION

*Central Nervous System:*

The scalp showed diffuse scalp hematoma on its undersurface, prominently on the upper and back part of the head and extending to the back of neck. The skull did not show any fracture. The meanings were congested and apaque and were present in the chest cavity.

The brain (1320 gram) was previously dissected and was wrapped in a green coloured netted cloth. The brain was cut into several in-complete coronal sections (horizontal sections) keeping the base infact. There was diffuse oedema and congestion with patchy areas of contusions. The pituitary gland did not show any pathology. There was blood present around the foramen magnum (the spinal canal opening). The cerebral vessels were normal.

*Neck:*

The neck had been dissected at the 1st post-mortem examination. It was packed with gauze pieces. The soft tissue of the neck did not show any pathology. The air-passage had been opened at 1st post-mortem examination and on gross examination showed diffuse congestion and patchy areas of hemorrhage and ecchymotic patches. The thyroid gland was normal and the neck cartilages did not show any fracture. The neck blood vessels and the neck spine did not show any pathology.

*Cardiovascular System:*

The pericardium was present in the chest cavity. It had been opened during first post-mortem examination. The left inner preocardial surface shows 02 small tears measuring 01cms x 0.5cms and 0.5cms, with a hematoma on the outer surface.

The heart (290 grams) was cut into 04 large coronal sections. External surface shows patchy areas of petecheal hemorrhages. The rest of the epicardium, myocardium and endocardium did not show any pathlogy on gross examination. The great vessels arising from the heart showed normal anatomy.

The coronary arteries were dissected during first post-mortem examination and were patent.

The heart valves did not show any pathology on gross examination.

*Respiratory System*

The sternum and the front rib cage were opened at first post-mortem examination. The longue, neck structures, air passage and pericardium were present in the chest cavity as one block. The meninges were present in the chet cavity. The previously dissected heart and both lungs were present in the chest cavity.

The chest skin and subcutaneous tissue, which was not dissected at 1st post-mortem examination, were separated and showed patchy areas of subcutaneous contusions. There were patchy confusions on the left chest muscles. There was extensive contusion of the right chest muscles with hemorrhaging.

The chest bony cage did not show any fracture, however, there were hematoma in the inter-costal spaces, prominently on the lateral and posterior aspects of the rib cage along its entire length and breadth.

The right lung weighted 425 gms and the left lung weighed 404 gms. The external surfaces were smooth and glistening and showed patchy areas of petechiae and small ecchymotic parches measuring 0.5 cms x 0.7cms in diameter.

Both lungs were dissected at first post-mortem examination and were oedematous, deeply congested with patchy areas of hemorrhages.

The pulmonary arteries were healthy. No evidence of pulmonary embolism was detected.

The diaphragm was not separated or dissected at first post-mortem examination and was present in its normal anatomical position. The right dome showed patchy areas of hemorrhages.

*Abdominal Cavity:*

Organs in the abdominal cavity and the diaphragm were not removed for dissection at the first post-mortem examination, therefore were eviscerated along with the diaphragm for further dissection. The omentum and the mesenteric fat showed partchy aras of hemorrhages.

The peritoneum was unremarkable; however, the rectus muscle showed patchy areas of hemorrhages within the muscle and the abdominal wall fat.

There was hematoma along both sides of the spine from T12-L4.

*Alimentary System:*

The tongue and oesophagus were unremarkable. The anterior lower l/3rd of the stomach showed an area of pinkish discoloration - a contusion. On opening the stomach, the contents were 05ml - 10 ml of greenish/black colored fluid. No foul odour was noted upon opening of the stomach. The

stomach musosa showed oedema and patchy areas of congestion, and the duodenal mucosa was unremarkable. The external surfaces of the small and large bowl showed congestion.

The gall bladder was distended and the external surface showed few hemorrhagic tags. On opening the contents were thick dark-coloured bile.

The pancreatic (130 grams) head showed patchy areas of hemorrhage.

*Genito-Uninary System:*

The kidneys (right - 110 grams, left - 125 grams) were normal in size, site and configuration. The external surfaces were deeply congested to hemorrhagic in appearance. The capsules were non-adherent. The corticalsurfaces were smooth. Cut sections showed well-defined cortico-medullary demarcation. The renal pelvis and ureters were unremarkable.

The uriny bladder was contained about 150ml of brown-colored urine.

The urethra was not examined.

*Endocrine System:*

The thyroid and pituitary were unremarkable.

The adrenal glands (Rt 05gms; Lt 05gms). The cut surface of the left adrenal was hemorrhagic.

*Reticulo-endothelial System:*

The spleen (100 grams) was soft. Cut surface deep congestion and hemorrhages.

The lymph nodes were unremarkable.

*Musculoskeletal System:*

No bony deformity or fracture was noted.

Muscles of the upper trunk, lower trunk, both upper limbs and both lower limbs showed extensive contusions, hemorrhaging and blood clots.

FURTHER EXAMINATIONS:

Specimen collected:

1. Blood for Toxicology and drugs — Report Pending
2. Urine for Toxicology and drugs — Report Pending
3. Stomach contents for Toxicology and drugs — Report Pending
4. Urine for Myoglobinuria — Report Pending
5. Tissues for hostopthology (microscopic) examination —Report attached.

PROVISIONAL CAUSE OF DEATH (PENDING TOXICOLOGY): A

Acute renal failure Due to Rhabdomyolysis

Due to Blunt trauma to skeletal muscles

s.g.d B

Dr Prashant N Samberkar

MBBS, MD

Lecturer (Forensic Pathology)

Department of Pathology C

University of Malaya

*History: (History as narrated by relatives)*

The deceased works for a towing company. He was taken in police custody for interrogation. Police informed relatives that he has died, when in custody on 20.01.2009 at 1140 hrs. A 1st post-mortem was conducted at the Hospital Serdang on 21.01.2009. That relatives were not happy with the 1st post-mortem result and therefore wanted a 2nd post-mortem examination at PPUM. The body was registered with PPUM for 2nd post-mortem on 24.01.2009 and the post-mortem was conducted on 25.01.2009. D E

As per relatives there is no past history of any illness or admission to the hospital, and the deceased is a non-smoker, non-alcoholic.

F

*Mechanism of death:*

Rhabdomyolsis is the rapid breakdown (lysis) of Skeletal Muscle Tissue (rhabdomyo) due to injury to muscle tissue. The muscle damage may be caused by physical (eg crush injury), chemical, or biological factors. The destruction of the muscle leads to the release of the breakdown products of damaged muscle cells into the bloodstream; some of these, such as myoglobin (a protein), are harmful to the kidney and may lead to Acute Kidney Failure. G

PTJ Forensik Patologi
Pusat Perubatan Universiti Malaya H
59100 Kuala Lumpur

KUGAN A/L ANANTHAN

EXTERNAL MARKS OF INJURY

A/26/2009 I

1. A 43 cms post-mortem surgical wound with sutures on the head.
2. A 58 cms post-mortem surgical wound with sutures on the mid-line of body.

3. A 02 cms x 0.5cms bruise on the right forehead.
4. A 05 cms x 03 cms contusion at the junction of left shoulder and left arm.
5. A 06 cms x 06 cms contusion on the left chest.
6. A 14 cms x 06 cms contusion on the left arm.
7. A 11 cms x 7.5 cms contusion on the lower 1/3rd of left chest.
8. A 04 cms x 03 cms bruise on the left cubital fossa.
9. A 25 cms x 22 cms contusion on the left side of abdomen.
10. A 17 cms x 14 cms contusion on the outer side of left thigh.
11. A 12 cms x 10 cms '>' patterned burns wound.
12. A 6.5 cms post-mortem surgical incision with sutures.
13. A 20 cms x 18 cms contusion on the left thigh.
14. A 07 cms post-mortem surgical wound with sutures.
15. A 30 cms x 20 cms contusion on the left leg.
16. A 1.5 cms x 1.5 cms scratch abrasion on the outer side of left ankle.
17. A 08 cms x 07 cms contusion on the right shoulder.
18. A 06 cms x 01 cms burns wound on the outer side of injury no. (17).
19. A 03 cms x 02 cms bruise on the right side of chest.
20. A 11 cms x 07 cms contusion on the right arm.
21. A 02 cms x 02 cms bruise on the right side of chest.
22. A 09 cms x 07 cms contusion on the lower l/3rd of the right chest.
23. A 04 cms x 02 cms area of bruise on the right elbow joint.
24. A 18 cms x 10 cms area of bruise on the right thigh.
25. A 7.5 cms post-mortem surgical incision with sutures.
26. A 07 cms x 02 cms scratch abrasion on the right arm.
27. A 14 cms x 10 cms contusion on the right leg.
28. A 07 cms post-mortem surgical incision with sutures.
29. A 13 cms x 11 cms contusion on the back of left forearm.
30. A 33 cms x 13 cms contusion on the back of left forearm.
31. A 13 cms x 12 cms patterned (handcuffs) abrasion with bruising on left wrist.
32. A 17 cms x 14 cms contusion overlying the left buttock and upper 1/3rd of back of left thigh.
33. A 25 cms x 24 cms contusion on the back of left thigh.

34. A 07 cms x 05 cms area of bruising with scratch abrasion on the back of left knee joint.
35. A 34 cms x 18 cms contusion over the left calf muscle.
36. A 10 cm x 09 cms area of patterned (ankle cuffs) abrasion, with bruising and soft tissue swelling.
37. Bluish-Black discoloration of the outer surface of the left foot.
38. All cms x 03 cms contusion on the back of right arm.
39. A 55 cms x 45 cms area of contusion over the entire back with multiple, repeated application of heat with a instrument or object with a triangular surface, causing multiple 'V' shaped imprint burns wounds are in their healing stages as is evident from the formation of black crusts and few are infected and covered with purulent exudates.
40. A 37 cms x 12 cms contusion on the back of right forearm.
41. A 13 cms x 04 cms patterned (handcuffs) abrasion with bruising on the right wrist.
42. A 32 cms x 20 cms contusion overlying the right buttock and the back of right thigh.
43. A 34 cms x 19 cms contusion over the right calf muscle.
44. A 07 cms x 04 cms patterned (ankle cuffs) abrasion with bruising.
45. Bluish-Black discoloration on the outer surface of the right foot.

s.g.d

Dr Prashant N Samberkar

MBBS, MD

Lecturer (Forensic Pathology)

Department of Pathology

University of Malaya

KUGAN A/L ANANTHAN

HISTOPATHOLOGY REPORT

A/26/2009

70 tissue samples were taken from the body for microscopic examination and following are the microscopic findings.

1. Meninges: sections show normal meninges.
2. Brain: sections show congested blood vessels.
3. Brain: sections show congested blood vessels.
4. Brain: sections show congested blood vessels.

5. Scalp: sections show hair follicles and subcutaneous fibro fatty tissue and have areas of hemorrhages confirming the gross findings.

6. Trachea: sections show muscosal inflammation and congested dilated blood vessels. Peritracheal fatty tissue shows areas of hemorrhage.

7. Trachea: sections show normal morphology.

8. Pericardium: sections show remnants of thymus with fatty tissue.

9. Pericardium: section show hemorrhage between pericardium and thymus.

10. Heart: sections show focal area of hemorrhage in the epicardial fat and few scattered foci of lymphocytes in the myocardium.

11. Left Lung: sections show large areas of pulmonary hemorrhages and edema and chronic congestion. No hemosidderin laden macphages.

12. Left Lung: same - as - above.

13. Left Lung: same - as - above.

14. Left Lung: same - as - above.

15. Stomach: autolysed

16. Liver: sections show very mild fatty change, mild diffuse sinusoidal congestion and mild lymphocytic infiltrate in the portal tract.

17. Liver: same - as - above.

18. Liver: same - as - above.

19. Spleen: sections show large areas of hemorrhages with partial autolysis.

20. Right Kidney: sections show numerous casts in the tubules and collecting ducts. There is widespread acute tubular necrosis and shows that the casts are strongly positive for myoglobin (1 in 30,000 dilutions].

21. Right Kidney: same - as - above.

22. Left Kidney: same - as - above.

23. Left Kidney: same - as - above.

24. Pancreas: Autolysed

25. Pancreas: Autolysed

26. Mysentry: sections show normal fatty tissue.

27. Mysentry: sections show normal fatty tissue.

28. Mysentry: sections show normal fatty tissue.

29. Mysentry: sections show normal fatty tissue.

30. Mysentry: sections show normal fatty tissue.

31. Right Adrenals: partially autolysed.
32. Left Adrenals: sections show focal areas of congestion with partial autolysis.
33. Urinary Bladder: sections do not show any significant findings.
34. Right Testis: sections show normal testicular morphology
35. Left Testis: sections do not show any pathology
36. Prostate: section show normal prostate morphology.
37. Gall Bladder: Autolysed.
38. Gall Bladder: Autolysed.
39. Gall Bladder: Autolysed.
40. Right Nect Muscle: section show hemorrhage.
41. Left Forearm Muscle: sections show normal skeletal muscle.
42. Right Rectus Abdominus Muscle: section do not show any pathology.
43. Left Calf Muscle: section show large areas of hemorrhages with fatty tissue.
44. Right Calf Muscle: section show large areas of hemorrhages with fatty tissue.
45. Left Wrist Skin: sections show inflammatory infiltrate in the subcutaneous tissue.
46. Right Wrist Skin: sections show inflammatory infiltrate in the subcutaneous tissue.
47. Right Thigh Skin: sections do not show any vital reaction.
48. Left Thigh Skin: sections do not sjow any vital reaction.
49. Right Foot Skin: sections show mild perivascular inflammatory reaction.
50. Left Knee Skin: section show deep areas of hemorrhages.
51. Back Skin: sections show denuded epidermal layer of skin with bacterial growth. Sections also show remnants of hair follicles and hair shaft with scattered inflammatory cells.
52. Left Back Skin: sections show definite perivascular vital reaction.
53. Left Back Skin: sections show definite perivascular vital reaction.
54. Right Chest Tissue: sections show hemorrhage in the muscle and fat.
55. Right Chest Tissue: sections show hemorrhage in the muscle and fat.
56. Left Lower Back: sections show large areas of severe hemorrhages in the fat.

57. Left Lower Back: sections show large areas of severe hemorrhages in the fat.

58. Left Upper Back: sections show large areas of severe hemorrhages in the fat.

59. Left Upper Back: sections show large areas of severe hemorrhages in the fat and muscles with severe Rabdomyolsis, fragmentation and hemorrhage in muscle.

60. Left Upper Back: sections show fat and hemorrhage.

61. Left Upper Back: sections show large areas of severe hemorrhages in the fat and fibrofatty tissue.

62. Left Upper Back: sections show large areas of severe hemorrhages in the fat and fibrofatty tissue.

63. Left Upper Back: sections show large areas of hemorrhages in the fat and fibrofatty tissue with fragmentation and Rabdomyolsis.

64. Right Upper Back: sections show areas of severe hemorrhages in the fat and fibrofatty tissue.

65. Right Upper Back: sections show areas of severe hemorrhages in the fat and fibrofatty tissue.

66. Right Upper Back: sections show areas of severe hemorrhages in the fat and fibrofatty tissue.

67. Right Lower Back: sections show areas of severe hemorrhages in the fat and fibrofatty tissue.

68. Right back: sections show inflammatory infiltrate with vital reaction in the upper dermis predominantly perivascular.

69. Right Back: sections show inflammatory infiltrate with vital reaction in the upper dermis predominantly perivascular.

70. Right Back: sections show loss of superficial layer of skin the epidermis with perivascular inflammatory infiltrate and bacterial growth.

s.g.d

DR Prashant N Samberkar

MBBS, MD

Lecturer (Forensic Pathology)

Department of Pathology

University of Malaya

KUGAN A/L ANANTHAN

HISTOPATHOLOGY TISSUE SAMPLES

A/26/2009

| ORGAN BLOCKS | CASETS NO |
|---|---|
| Meninges | 01 |
| Brain | 02 |
| Brain | 03 |
| Brain | 04 |
| Scalp | 05 |
| Trachea | 06 |
| Trachea | 07 |
| Pericardium | 08 |
| Pericardium | 09 |
| Heart | 10 |
| Left Lung | 11 |
| Right Lung | 12 |
| Right Lung | 13 |
| Right Lung | 14 |
| Stomach | 15 |
| Liver | 16 |
| Liver | 17 |
| Liver | 18 |
| Spleen | 19 |
| Right Kidney | 20 |
| Right Kidney | 21 |
| Left Kidney | 22 |
| Left Kidney | 23 |
| Pancreas | 24 |
| Pancreas | 25 |
| Mysentry | 26 |
| Mysentry | 27 |
| Mysentry | 28 |
| Mysentry | 29 |
| Mysentry | 30 |
| Right Adrenals | 31 |
| Left Adrenals | 32 |
| Urinary Bladder | 33 |
| Right Testis | 34 |
| Left Testis | 35 |
| Prostrate | 36 |
| Gall Bladder | 37 |
| Gall Bladder | 38 |
| Gall Bladder | 39 |

| | |
|---|---|
| Right Neck Muscle | 40 |
| Left Forearm Muscle | 41 |
| Right Rectus Abdominus Muscle | 42 |
| Left Calf Muscle | 43 |
| Right Calf Muscle | 44 |
| Left Wrist Skin | 45 |
| Right Wrist Skin | 46 |
| Right Thigh Skin | 47 |
| Left Thigh Skin | 48 |
| Right Foot Skin | 49 |
| Left Knee Skin | 50 |
| Back Skin | 51 |
| Left Back Skin | 52 |
| Left Back Skin | 53 |
| Right Chest | 54 |
| Right Chest | 55 |
| Left Lower Back | 56 |
| Left Lower Back | 57 |
| Left Upper Back | 58 |
| Left Upper Back | 59 |
| Left Upper Back | 60 |
| Left Upper Back | 61 |
| Left Upper Back | 62 |
| Left Upper Back | 63 |
| Right Upper Back | 64 |
| Right Upper Back | 65 |
| Right Upper Back | 66 |
| Right Lower Back | 67 |
| Right Back | 68 |
| Right Back | 69 |
| Right Back | 70 |
| Total | 70 Casets |

s.g.d

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59100 KUALA LUMPUR
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Fax:(603) 79494603

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RADIOLOGICAL REPORT

| | |
|---|---|
| Patient | KUGAN A/L ANANTHAN |
| Date of Birth | 30/08/1986 |
| Request Number | 2009012500081 |
| RN Number | 860830435645/23877855 |
| Referring Doctor | |
| Examination Date | 25/01/2009 |

XR BOTH HAND AP/LAT

XR Right Forearm (Radius/Ulna) AP

XR Right Humerus AP

XR BOTH FOOT AP/OBLIQUE

XR BOTH TIBIA FIBULA AP/LAT

XR BOTH FEMUR AP/LAT

XR Pelvis AP

XR Abdomen AP Supine

XR Chest AP Supine

XR Skull AP

*Indication*

For post mortem examination

*Findings*

XR (R) & (L) hands — No fracture/dislocation seen. Joint spaces are preserved.

XR (R) & (L) Radius/Ulna — No fracture/dislocation seen. Joint spaces are preserved.

XR (R) & (L) Humerus — No fracture/dislocation seen.

XR (R) & (L) Foot (AP/Oblique) — No fracture/dislocation seen. Joint spaces are preserved.

XR (R) & (L) Tibia/Fibula (AP/Lat) — There is a radio opacity projected over the subcutaneous area adjacent to the media aspect of the left ankle joint? Significance. However underlying bones show no fracture. The right tibia and fibula are normal.

XR (R) & (L) Femur (AP/Lat) — No fracture seen.

XR Pelvis: No fracture/dislocation noted.

XR Abdomen (Supine): faecal laden bowel loops seen.

XR Skull (AP) — Evidence of craniotomy noted.

CXR (Supine) — Both lungs appear opaque. The right lung is collapsed. Moderate right pleural effusion seen. Trachea not visualized.

Unable to delineate cardiac border.

No rib fracture noted. Clavicle and spatula are normal.

Drs Vicky/Yuzairif/Shazriman/Umarani/

PROF MADYA DR YANG FARIDAH ABDUL AZIZ

| | | | |
|---|---|---|---|
| 1/25/2009 10:38 AM | SIGNED BY STAFF RADIOLOGIST | PROF MADYA DR YANG FARIDA ABDUL AZIZ | (RAD) PROF MADYA DR YANG FARIDA ABDUL AZIZ |
| 1/26/2009 10:38 AM | RESULT MODIFIED | PROF MADYA DR YANG FARIDA ABDUL AZIZ | (RAD) PROF MADYA DR YANG FARIDA ABDUL AZIZ |
| 1/25/2009 6:02 PM | RESULT MODIFIED | PROF MADYA DR YANG FARIDA ABDUL AZIZ | (MO) DR UMARANI ANN RANJIN SIVARAJAN |
| 1/25/2009 6:00 PM | SIGNED BY RESIDENT | PROF MADYA DR YANG FARIDA ABDUL AZIZ | (MO) DR UMARANI ANN RANJIN SIVARAJAN |
| 1/25/2009 6:00 PM | PRELIM RESULT | PROF MADYA DR YANG FARIDA ABDUL AZIZ | (MO) DR UMARANI ANN RANJIN SIVARAJAN |

Report status SIGNED BY STAFF RADIOLOGIST / Physician (RAD) PROFMADYA DR YANG FARIDAH ABDUL AZIZ

Computer generated report. No signature required.

(j) The second defendant was charged at the session court under ss 330 and

331 of the Penal Code for causing grievous hurt to the deceased. On 28 January 2011, the second defendant was acquitted and discharged of the charges by the sessions court without calling him to enter his defence. The prosecution then appealed against the acquittal to the High Court. On appeal, the High Court allowed the appeal of the prosecution and directed the second defendant to enter his defence and remitted the case to the sessions court. At the close of the defence case, the session court found the second defendant guilty of the charges, convicted and sentenced him to three years imprisonment for both the charges to run concurrently. The second defendant has filed an appeal to the High Court against the conviction and sentence. The charge against the second defendant is reproduced:

PENDAKWA RAYA

LAWAN

NAVINDRAN A/L VIVEKANANDAN

(No KP: RF 141631)

*PERTUDUHAN PERTAMA*

Kamu didakwa atas kehendak Pendakwa Raya dan pertuduhan ke atas kamu ialah:

Bahawa kamu pada *16 Januari 2009 jam 7.00 pagi dibilik soal siasat pejabat D9, Balai Polis Taipan, USJ, Subang Jaya,* di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah dengan sengaja menyebabkan cedera parah kepada Kugan A/L Ananthan (KP: 860803-43-5645) bagi maksud hendak memeras daripadanya apa-apa pengakuan bersalah atau apa-apa maklumat yang boleh membawa kepada diketahui sesuatu kesalahan atau salahlaku; dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah *s 331 Kanun Keseksaan.* (Emphasis added.)

Hukuman:

Sekiranya disabitkan, hendaklah dihukum dengan penjara selama tempoh yang boleh sampai sepuluh tahun, dan bolehlah dikenakan denda.

*PERTUDUHAN PILIHAN UNTUK PERTUDUHAN PERTAMA*

Bahawa kamu pada *16 Januari 2009 jam 7.00 pagi, di bilik soal siasat pejabat D9, di Balai Polis Taipan, USJ, Subang Jaya* di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah dengan sengaja menyebabkan cedera kepada Kugan A/L Ananthan (KP: 860803-43-5645) bagi maksud hendak memeras daripadanya apa-apa pengakuan bersalah atau apa-apa maklumat yang boleh membawa kepada diketahui sesuatu kesalahan atau salahlaku; dan oleh yang demikian kamu melakukan suatu kesalahan yang boleh dihukum *di bawah s 330 Kanun Keseksaan.*(Emphasis added.).

*PERTUDUHAN KEDUA*

Kamu didakwa atas kehendak Pendakwa Raya dan pertuduhan ke atas kamu ialah:

Bahawa kamu pada *16 Januari 2009 jam 4.00 petang, di bilik soal siasat pejabat D9, di Balai Polis Taipan, US), Subang Jaya,* di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah dengan sengaja menyebabkan cedera parah kepada Kugan A/L Ananthan (KP: 860803-43-5645) bagi maksud hendak memeras daripadanya apa-apa pengakuan bersalah atau apa-apa maklumat yang boleh membawa kepada diketahui sesuatu kesalahan atau salahlaku; dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum *di bawah s 331 Kanun Keseksaan.*(Emphasis added.)

Hukuman:

Sekiranya disabitkan, hendaklah dihukum dengan penjara selama tempoh yang boleh sampai sepuluh tahun, dan bolehlah dikenakan denda.

*PERTUDUHAN PILIHAN UNTUK PERTUDUHAN KEDUA*

Bahawa kamu pada *16 Januari 2009 jam 4.00 petang, di bilik soal siasat pejabat D9, di Balai Polis Taipan, US), Subang Jaya* di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah dengan sengaja menyebabkan cedera kepada Kugan A/L Ananthan (KP: 860803-43-5645) bagi maksud hendak memeras daripadanya apa-apa pengakuan bersalah atau apa-apa maklumat yang boleh membawa kepada diketahui sesuatu kesalahan atau salahlaku; dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum *di bawah s 330 Kanun Keseksaan.*(Emphasis added.)

Hukuman:

Sekiranya disabitkan, hendaklah dihukum dengan penjara selama tempoh yang boleh sampai tujuh tahun, dan bolehkan dikenakan denda.

(k) The first to the fourth defendants are liable for misfeasance in the public office on the following grounds:

(i) the defendants made repeated and sustained attempts to cover up the cause of death of Kugan a/l Ananthan and the persons responsible thereof;

(ii) the defendants refused to allow access to or inform the plaintiff of the location of the deceased after his arrest; and

(iii) the circumstances surrounding and the acts that led to the death of the deceased are as stated in the foregoing paragraphs.

(l) The deceased was wrongfully imprisoned and deprived of his liberty between 14 January 2009 and 20 January 2009. The defendants had also denied the plaintiff's access to the deceased and the conduct of the defendants was oppressive, arbitrary and unconstitutional.

**[2]** The plaintiff has claimed for the following reliefs:

(a) under s 7 of the Civil Law Act 1956, damages for the aforesaid dependant;

(b) under s 8 of the Civil Law Act 1956, damages for the benefit of the estate of the deceased;

(c) damages for assault and battery in the sum of RM50,000;

(d) damages for false imprisonment for a period of in seven days the sum of RM10,000,000;

(e) damages for misfeasance of public office in the sum of RM10,000,000;

(f) aggravated damages in the sum of RM10,000,000;

(g) exemplary damages in the sum of RM10,000,000;

(h) vindicatory damages in the sum of RM10,000,000;

(i) special damages;

(j) a declaration that the defendants had 'willfully and maliciously breached the fundamental liberties' of the deceased Kugan a/l Ananthan, as contained in Part II of the Federal Constitution;

(k) interest on the decretal sum at such rate and for such rate and for such period deemed fit and appropriate by this honourable court;

(l) costs; and

(m) such further and/or other reliefs deemed just and fit by this honourable court.

**[3]** The defendants have denied the plaintiff's claim. By the statement of defence dated 17 February 2012 ('encl 5'), the first, third, fourth and fifth defendants have pleaded, inter alia, and briefly, as follows:

(a) si mati telah ditahan bagi satu siasatan kesalahan jenayah dan penahanan si mati adalah di bawah peruntukan undang-undang yang sah.

(b) defendan pertama menafikan mengeluarkan pernyataan palsu berhubung sebab kematian si mati. Pernyataan sebab kematian si mati oleh defendan pertama adalah berdasarkan kepada laporan autopsi pertama yang disediakan oleh Dr Abdul Karim bin Hj Tajudin bertarikh 21 Januari 2009.

A (c) Penyiasatan pihak polis telah berakhir apabila defendan kedua telah dituduh di bawah s 330 dan s 331 Kanun Keseksaan.

(d) Tindakan defendan kedua adalah satu tindakan peribadi defendan kedua dan bukan dalam tugas rasmi defendan kedua dan defendan pertama, ketiga, keempat dan kelima bergantung kepada s 5 dan s 6 Akta Prosiding Kerajaan 1956.

(e) Defendan pertama, ketiga, keempat dan kelima *mengakui* bahawa estet si mati telah mengalami kerugian disebabkan kematian *si mati dan si mati telah mengalami kecederaan semasa dalam penahanan.* (Penekanan ditambah.)

(f) Kausa tindakan plaintif bagi kecuaian statutori adalah salah anggap dan salah di sisi undang-undang dan tidak disokong oleh fakta. Manakala, kausa tindakan untuk penyalahgunaan kuasa awam (misfeasance in public office) tidak disokong oleh mana-mana fakta yang diplidkan dalam pernyataan tuntutan.

(g) Segala tindakan defendan pertama, ketiga, keempat dan kelima dalam penahanan reman adalah di bawah satu perintah mahkamah yang sah. Permohonan untuk mencabar perintah reman merupakan satu permohonan jenayah dan bukan melalui permohonan di mahkamah sivil.

(h) Plaintif tidak berhak untuk semua ganti rugi yang dituntut.

**[4]** By the statement of defence dated 29 May 2012 ('encl 30'), the second defendant has pleaded, inter alia, and briefly, as follows:

(a) si mati telah ditangkap bagi membantu siasatan di bawah s 95/397 Kanun Keseksaan dan penahanan si mati adalah munasabah (*reasonable*), teratur (*proper*) dan mengikut undang-undang.

(b) sepanjang tempoh si mati ditahan iaitu pada 14 Januari 2009 hingga 20 Januari 2009, si mati berada di bawah tahanan, jagaan dan tanggungjawab anggota dan pegawai polis yang berlainan dan *tidak berada dalam jagaan dan kawalan defendan kedua secara eksklusif.* (Penekanan ditambah.)

(c) selepas reman, si mati telah ditahan dan disoal siasat *di Pejabat D9 Balai Komuniti Taipan atas arahan pegawai polis bernama D/SL Loh 66501*. Oleh yang demikian, kebajikan, kesihatan dan keselamatan si mati adalah di bawah tanggung jawab D/SL Loh dan bukan defendan kedua. (Penekanan ditambah.)

(d) *semasa dalam tahanan di Balai Polis Taipan, si mati telah disoal siasat selama 24jam setiap hari secara bergilir-gilir oleh pegawai dan anggota yang bertugas.*(Penekanan ditambah.)

(e) semasa si mati dalam jagaan defendan kedua:

(i) si mati dalam keadaan baik dan tidak mengalami apa-apa kecederaan;

(ii) defendan kedua tidak menggunakan apa-apa kekerasan atau paksaan terhadap si mati; dan

(iii) defendan kedua tidak pernah secara sengaja mahupun cuai menyebabkan kecederaan fizikal dan emosi terhadap si mati.

(f) defendan kedua tidak mempunyai akses atau diberikan kepada si mati pada bila-bila masa sebelum atau selepas waktu bertugas;

(g) defendan kedua telah didakwa atas sebab dan asas yang munasabah di bawah ss 330 dan 331 Kanun Keseksaan walaupun terdapat bukti bahawa *si mati telah dikawal dan disoal siasat secara bergilir-gilir selama 24jam bermula dari 14 Januari 2009 hingga 20 Januari 2009.* (Penekanan ditambah.)

**[5]** The statement of agreed facts as agreed by all the parties are as follows:

(a) plaintif adalah ibu dan pentadbir estet Kugan a/l Ananthan si mati, beralamat di P2-B-07-10, Apartment Sri Lamel, Jalan Sepakat Indah 3, 43000 Kajang, Selangor dan memulakan tindakan ini untuk faedah tanggungan-tanggungan si mati di bawah s 7 Akta Undang-Undang Sivil 1956 dan untuk faedah estet si mati di bawah s 8 Akta Undang-Undang Sivil 1956. Surat-surat pentadbiran telah diberikan kepada plaintif daripada Pendaftar Mahkamah Tinggi di Kuala Lumpur pada 3 Ogos 2011;

(b) *defendan pertama* adalah pada masa material tersebut seorang Timbalan Pesuruhjaya Polis dan Ketua Polis Selangor *yang mempunyai bidang kuasa atas, inter alia, Balai Polis Taipan.* (Penekanan ditambah.);

(c) *defendan kedua* adalah pada masa material tersebut seorang polis konstabel *yang bertugas di Balai Polis Taipan* beralamat di Balai Polis USJ 10/1D, 47620 Subang Jaya, Selangor ('Balai Polis Taipan') pada masa material tersebut. (Penekanan ditambah.);

(d) *defendan ketiga* adalah pada setiap masa material, seorang Penolong Pesuruhjaya Polis dan Pegawai Pemerintah Daerah ('OCPD') Subang Jaya, Selangor. Defendan ketiga telah meninggal dunia;

(e) *defendan keempat* pada *setiap masa material, mengawas dan mengawal, inter alia, kakitangan polis yang bertugas di Balai Polis Taipan dan juga defendan-defendan pertama dan ketiga dalam melaksanakan tugas-tugas dan tanggungjawab mereka.* Alamat penyampaian defendan keempat di Ibu Pejabat Polis Bukit Aman, Jalan Bukit Aman, Tasik Perdana, 50560 Kuala Lumpur, (Penekanan ditambah.);

(f) *defendan kelima* adalah kerajaan Malaysia dan *pada setiap masa material, majikan dan/atau prinsipal kepada defendan-defendan pertama, kedua, ketiga dan keempat dan juga polis yang bertugas di Balai Polis Taipan.* Alamat penyampaian defendan kelima adalah di bawah jagaan Jabatan Peguam Negara, No 45, Persiaran Perdana, Presint 4, 62100 Putrajaya. (Penekanan ditambah.);

(g) pada atau lebih kurang 14 Januari 2009, Kugan a/l Ananthan, si mati, telah ditangkap oleh anggota polis;

(h) pada 15 Januari 2009 si mati telah dibawa untuk perintah reman di Mahkamah Majistret Petaling Jaya dan perintah reman dikeluarkan mulai 15 Januari 2009 sehingga 21 Januari 2009;

(i) pada 20 Januari 2009, pada atau lebih kurang 9 malam, seorang pegawai polis memberitahu kepada plaintif bahawa anaknya, si mati Kugan a/l Ananthan, telah mati semasa dalam tahanan polis;

(j) *si mati telah berada dalam tahanan pihak polis dari 14 Januari 2009 sehingga 20 Januari 2009. Si mati telah berada dalam tahan, jagaan dan tanggungjawab anggota dan pegawai polis.* (Penekanan ditambah.);

(k) mayat si mati telah di bawa oleh polis ke Hospital Serdang di Jalan Puchong, 43000 Kajang, Selangor;

(l) *badan si mati mengandungi tanda-tanda pukulan yang luas dan serius.* (Penekanan ditambah.);

(m) satu autopsi telah dijalankan oleh pakar bedah siasat Serdang Hospital, Dr Abdul Karim bin Haji Tajudin pada 21 Januari 2009 lebih kurang 3 petang. Autopsi tersebut (report autopsi pertama) menyenaraikan *22 kategori kecederaan luaran dan kelukaan yang dialami oleh si mati.* Pakar bedah siasat tersebut walau bagaimanapun menyatakan bahawa sebab kematian tersebut adalah 'pulmanory edema' (Penekanan ditambah.);

(n) plaintif tidak berpuas hati dengan kesimpulan pemeriksaan autopsi pertama tersebut dan melantik Dr Prashant N Samberkar dari Pusat Perubatan Universiti Malaya (PPUM) untuk menjalankan satu pemeriksaan autopsi kedua di atas si mati;

(o) *si mati mengalami kecederaan diri yang serius yang mengakibatkan kematian.* (Penekanan ditambah.);

(p) pada 1 Oktober 2010, defendan kedua telah dituduh di Mahkamah Sesyen, Petaling Jaya di bawah s 330 dan 331 Kanun Keseksaan kerana telah menyebabkan kecederaan parah kepada si mati;

(q) defendan kedua telah disabitkan dengan kesalahan tersebut dan telah dihukum penjara;

(r) defendan kedua telah merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman dan rayuan tersebut masih tertangguh di Mahkamah Tinggi.

**[6]** The issues to be tried as agreed by all the parties is as follows:

(a) sama ada defendan-defendan gagal untuk memastikan keselamatan, kesihatan dan kebajikan si mati semasa dalam tahanan polis dari 14 Januari 2009 hingga 20 Januari 2009;

(b) sama ada defendan-defendan gagal untuk menyediakan satu sistem yang selamat untuk menyoal dan mengendali suspek dalam tahanan polis;

(c) sama ada defendan-defendan gagal untuk memastikan akses untuk si mati kepada peguam dan keluarganya atau memaklumkan kepada plaintif dan keluarganya tentang lokasi dan keadaan kesihatan si mati;

(d) sama ada defendan-defendan melaksanakan tugas mereka dengan cuai, tidak berperhatian dan tidak cekap dengan tanpa perhatian yang wajar terhadap hak untuk hidup (right to life), keselamatan dan kesihatan si mati;

(e) sama ada defendan-defendan gagal untuk memerhati dan bertindak secara konsisten dengan hak-hak undang-undang dan perlembagaan ke atas orang yang ditahan; dan

(f) sama ada plaintif dan estet si mati mengalami kehilangan dan kerugian (loss and damage) atas kecuaian defendan-defendan dan layak untuk gantirugi seperti yang dituntut dalam pernyataan tuntutan.

*For the second defendant*

(a) Siapakah yang telah menyebabkan kecederaan kepada Kugan a/l Ananthan semasa beliau berada dalam tahanan polis dari tarikh beliau ditangkap sehingga ke tarikh beliau meninggal dunia;

(b) Sama ada defendan kedua orang yang bertanggungjawab menyebabkan kecederaan kepada Kugan a/l Ananthan semasa Kugan a/l Ananthan berada dalam tahanan polis dari tarikh beliau ditangkap sehingga ke tarikh beliau meninggal dunia.

*For the first, third, fourth and fifth defendants*

(a) sama ada tindakan defendan kedua merupakan tindakan yang melibatkan tindakan peribadi dan defendan pertama, defendan ketiga, defendan keempat dan defendan kelima dilindungi di bawah s 5 dan s 6 Akta Prosiding Kerajaan 1956;

(b) sama ada defendan pertama, defendan ketiga dan defendan keempat telah memecah kewajipan statutori yang menjustikasi satu kausa tort kecuaian di bawah dalam tindakan ini;

(c) sama ada defendan pertama, defendan ketiga, defendan keempat dan defendan kelima dilindungi oleh s 32(1) Akta Polis 1967 bahawa segala tindakan berhubung dengan tahanan reman adalah di bawah perintah mahkamah yang sah pihak polis tidak boleh dipertanggungjawabkan atas apa-apa yang berhubungan dengannya;

(d) sama ada plaintif berhak untuk mendapatkan kesemua ganti rugi khususnya ganti rugi teladan, ganti rugi teruk dan ganti rugi 'vindicatory' memandangkan tindakan di bawa mengikut s 7 dan 8 Akta Undang-Undang Sivil 1956.

At the trial:

**[7]** Three witnesses had testified on the plaintiff's behalf:

| | | | |
|---|---|---|---|
| (a) | PW1 — | En N Surendran a/l K Nagarajan,<br>An Advocate and Solicitor of the<br>High Court, Malaya |
| (b) | PW1 — | Pn N. Indra a/p P. Nallathamby<br>The plaintiff and the mother of the deceased |
| (c) | PW3 — | Pn Renuga a/p Subramaniam<br>The deceased's aunt |

**[8]** The second defendant is the sole witness on his behalf.

**[9]** Six witnesses for D1, D3, D4 and D5 had testified on their behalf:

| | | |
|---|---|---|
| (a) | DW1 (for defendants 1, 3,4 and 5) - | Tan Sri Dato' Seri Khalid bin Abu Bakar (the first defendant and the Chief Police Officer of Selangor at the material time) |
| (b) | DW2 (for defendants 1, 3,4 and 5) - | Inspektor Faaezal bin Monir (the Pegawai Operasi of D9, Ibu Pejabat Polis Daerah Subang Jaya at the material time) |
| (c) | DW3 (for defendants 1, 3,4 and 5) - | Detektif Sub-Inspektor Loh Voon Chye (Penyelia Detektif at Balai Polis Taipan at the material time) |

| | | |
|---|---|---|
| (d) | DW4 (for defendants 1, 3,4 and 5) - | ASP Rodney Pasla Haris (Senior Investigating Officer of D9 at Ibu Pejabat Polis Subang Jaya at the material time) |
| (e) | DW5 (for defendants 1, 3,4 and 5) - | DSP Mohd Marzukhi bin Mohd Mokhtar (the Senior Investigating Officer at Ibu Pejabat Polis Daerah Petaling Jaya at the material time) |
| (f) | DW6 (for defendants 1, 3,4 and 5) - | Lans Koperal Mohd Haizan bin Hamid (Lans Koperal at Balai Police Taipan at the material time) |

Submissions

**[10]** In contesting the plaintiff's claim, learned senior federal counsel for the first, third, fourth and fifth defendants ('D1, D3, D4 and D5') has submitted, inter alia, and briefly, as follows:

*Liability*

(a) the second defendant had committed the offence and an investigation had been carried out with regard to the offence committed by the second defendant. The second defendant was then charged and convicted by the criminal court;

(b) from the evidence of DW6, the second defendant had entered and assaulted the deceased. DW6's evidence has been accepted by the criminal court;

(c) the second defendant's action was in his personal capacity (on a frolic of his own) and therefore, D1, D3, D4 and D5 are protected under ss 5 and 6 of the Government Proceeding Act 1956;

(d) there was no cover up by D1 as D2 was charged and convicted;

(e) the second defendant's allegation that he was only the 'scapegoat' is an afterthought and hearsay on the following grounds:

(i) it was only raised during the trial in the Civil Court;

(ii) it was never pleaded in his statement of defence;

(iii) it was never raised as part of his defence during the criminal trial;

(iv) investigation has been carried out by the police;

(v) he was charged and convicted at the criminal court.

*Damages*

6 As for the damages claimed by the plaintiff, learned Federal Counsel for D1, D3, D4 and D5 has submitted as follows:

(a) The plaintiff had failed to prove the actual amount given by the deceased. Therefore, the plaintiff is only entitled to get 1/3 for the loss of support as the reasonable amount that is RM300 (based on 1/3 from RM1000) x 16 x 12 = RM57,600.

(b) The funeral expenses amounting to RM9,702.70 is not disputed by D1, D3, D4 and D5.

(c) The plaintiff is not entitled for bereavement as the deceased died at the age of 23 years old and was unmarried.

(d) For the claim of pain and suffering, it is the discretion of this court, but the amount should be around RM10,000.

(e) Assault and battery could only be claimed by the deceased himself and cannot be claimed by the estate or dependency.

(f) The plaintiff is not entitled to get damages for false imprisonment on the following grounds:

(i) The deceased had been lawfully remanded by the magistrate under s 117 of the Criminal Procedure Code.

(ii) Police are protected under s 32(1) of the Police Act 1957 for the immunity in carrying out their duty.

(iii) The deceased was under the custody of the D9 Police Officer. D1, D3, D4 and D5 did not involve in giving such instruction and is protected under ss 5 and 6 of the Government Proceeding Act 1956.

(iv) Any allegation related to the issue of lockup must be alleged against the tortfeasors.

(g) The plaintiff is not entitled for damages for misfeance of public office, aggravated damages, exemplary damages and vindicatory damages as it is not claimable under ss 7 and 8 of the Civil Law Act 1956.

(h) The plaintiff has failed to prove special damages ie deceased's belongings which were lost during the arrest.

(i) There are no lawful recipients to accept the declaration that the defendants had willfully and maliciously breached the fundamental liberties of the deceased. It is not provided understand s 8 of the Civil Law Act 1956.

(j) Costs of RM20,000 is reasonable:

7 The claim against D1, D3, D4 and D5 be dismissed with costs.

**[11]** In support of his submissions, learned senior federal counsel for D1, D3, D4 and D5, had referred to the following authorities: **A**

(a) *Yap Ami & Anor v Tan Hui Pang* [1982] 2 MLJ 316;

(b) *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269; **B**

(c) s 7 of the Civil Law Act 1956;

(d) *Chan Chin Ming v Lim Yoke Eng* [1994] 3 MLJ 233;

(e) *Ali Tan & Ors v Mazlan Bidin & Anor* [2012] 4 CLJ 736;

(f) *Takong Tabari v Government of Sarawak & Ors* [1996] 5 MLJ 435; **C**

(g) *Esah bte Ishak (a mother and legal dependant of Nazri bin Ahmad Ramli, deceased) & Anor v Kerajaan Malaysia & Anor* [2006] 6 MLJ 1;

(h) s 8 of the Civil Law Act 1956; **D**

(i) *Thangavelu v Chia Kok Bin* [1981] 2 MLJ 277;

(j) *Madjai bin Sanusi v Pengarah Imigresen Johor & Ors* [2000] 5 MLJ 116; [1999] 7 CLJ 569;

(k) *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663; **E**

(l) *Lo Foi v Lee Ah Kong & Ors* [1997] MLJU 310; [1998] 1 CLJ 244 Supp 259;

(m) *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; **F**

(n) *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 261; [1999] 5 CLJ 335; and

(o) *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145. **G**

**[12]** On the other hand, in contesting the plaintiff's claim against the second defendant, ('D2'), learned counsel for the second defendant had submitted as follows: **H**

*Liability*

(a) the root cause of the deceased's death is the recklessness, carelessness, negligence or conduct of D1, D3, D4 and D5; **I**

(b) ASP Rodney Pasla Haris (DW4), Inspector Faaezal bin Monir (DW2), Inspector Wan Zahurin bin Zaharin and Detective Sub Inspector Loh Voon Chye (DW3) ('the superior officers') were under the control and command of D1, D3, D4 and D5;

(c) the superior officers had ordered the deceased to be detained in a building which has no security features and lockup facilities;

(d) the superior officers had ordered the second defendant and 13 other low ranking police officers who were under their supervision to interrogate the deceased for 24 hours non stop for 6 days without proper food, drink, rest and sleep;

(e) the superior officers had authorized the offensive practice to the deceased's health, well being, legal and constitutional rights during his detention;

(f) the superior officers had failed to lodge a police report in respect of the alleged assault or remedy and were equally responsible and liable for the deceased's death;

(g) the superior officers had failed to supervise their subordinates misbehavior and had caused or contributed to that conduct;

(h) the second defendant did not cause the deceased's death on the following grounds:

(i) the second defendant was never investigated or charged for murder;

(ii) there was no inquest held into the death of the deceased;

(iii) the second defendant was picked out and made to face a criminal charge.

(i) the deceased died under mysterious circumstances;

(j) the deceased's death requires further investigation;

(k) the police had rushed to judgment and had engaged into a conspiracy to frame the second defendant due to massive public outcry.

*Damages*

(l) The second defendant adopts D1, D3, D4 and D5 submissions on quantum of damages.

(m) Therefore, the plaintiff's claim against the second defendant should be dismissed and if liability is found against the second defendant, D1, D3, D4 and D5 is to be made vicariously liable to the plaintiff.

**[13]** In support of his submissions, learned counsel for D2 had referred to the following authorities:

(a) s 5 of the Government Proceedings Act 1956;

(b) *Clerk & Lindsell on Torts* (17th Ed) London, Sweet & Maxwell, 1995 at paras 2–24; and

(c) *Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor (Yap Burgess Rawson International Sdn Bhd, third party)* [2006] 6 MLJ 768.

**[14]** In support of the plaintiff's claim, learned counsel for the plaintiff has submitted, inter alia and briefly, as follows: **A**

*Liability*

(a) Kugan was entirely under the custody, care and responsibility of the defendants. The defendants owe duty of care to Kugan, the deceased while he was in custody of the police. Each and every person had the close proximity to Kugan is responsible to ensure safety and wellness of him while he was in custody; **B**

(b) the cause of death of the deceased was as a result of beating by the police personnels at Taipan Police Station; **C**

(c) apart from the second defendant, the other personnel of the police who were in charge of the custody of the Kugan are also equally responsible for the injuries sustained by Kugan for the following reasons:

(i) DW6 saw the second defendant beating Kugan only on 16 January 2009; **D**

(ii) 45 categories of injuries could not possibly be caused in one session of beating;

(iii) Kugan was under the supervision and close proximity of the police personnel and must be responsible for the injuries sustained by Kugan. **E**

(d) the second defendant's tortious act is not frolic of his own on the following grounds:

(i) The second defendant was the authorized personnel to record Kugan's statement; **F**

(ii) The second defendant discharged his official duty as a police officer under the control of D1, D3, D4 and D5;

(iii) The criminal charge against the second defendant was for causing grievous bodily harm in order to extract confession from Kugan; **G**

(iv) The second defendant had committed the said tortious act and D1, D3, D4 and D5 are vicariously liable for the tortious act of the second defendant.

(e) D1, D3, D4 and D5 had concealed the truth behind the death of Kugan on the following grounds: **H**

(i) prior to his death, the Police unlawfully, deliberately and maliciously withheld the information with regard to Kugan's arrest from the plaintiff and her family;

(ii) upon the death of Kugan on 20 January 2009 at about 9am, the plaintiff and her family members were denied access to the body of Kugan and were only allowed viewing the body of Kugan at about 1am on 21 January 2009 upon intervention of the lawyers and opposition politicians; **I**

(iii) D1 had issued a false statement to the media stating that Kugan 'had asked for a glass of water and then collapsed and died'. He then issued another media statement that the cause of death 'was due to water in the lungs' despite having full knowledge of the injuries of Kugan and circumstances of his death;

(iv) unofficial meeting was conducted by the third defendant upon the death of Kugan and the third defendant had requested police personel to volunteer to accept the blame. The second defendant was then asked to accept the blame on behalf of everyone in causing injuries to Kugan on condition his future will be taken care off;

(v) the entire station diary was fabricated to conceal the truth behind the death of Kugan; and

(vi) D1 in the cause of the trial made malicious allegation against the family that the injuries bore by Kugan could also be tempered by the family members.

*Damages*

(f) Loss of support — Kugan's earnings was RM3,000 per month and he had contributed RM1,000 per month to the family. As such, the RM1,000 is proven to be the multiplicand in arriving at loss of support. The multiplier is 16 years as he is 21 years old at the time of his death. (RM1000 (multiplicand) x 12 months x 16 (Multiplier) = RM192,000).

(g) Funeral expenses — RM9,709.70.

(h) Pain and suffering — the administratrix of the Kugan's estate is entitle to damages for pain and suffering as Kugan was tortured continuously for a period of seven days prior to his death. Pray for RM1m for pain and suffering.

(i) Assault and battery — Kugan was killed by a tortious assault and the cause of action survives the death and remains vested in the estate and the plaintiff representing the estate is entitled for compulsory damages. Pray for RM1m under this head of claim

(j) False imprisonment — the detention was unlawful as the police did not comply with the lockup rules. Pray for RM500,000 as damages for false imprisonment.

(k) Misfeasance in public office — the police try to cover up the events connected to Kugan's death. The police force ought to be more transparent in revealing the culprit responsible for the death of Kugan. It is dubious to say that only the second defendant is responsible for the death of Kugan in the light of multiple injuries sustained by Kugan. Pray for RM1m for misfeasance in public office.

(l) Aggravated damages — the plaintiff can be awarded with aggravated damages and entitled to be awarded in the light of defendant's conduct in failing to make correction or retraction of media statement given on

21 January 2009 in relation to Kugan's death despite having full knowledge of the circumstances of Kugan's death. Pray for a sum of RM500,000 having regard to the seriousness of the police act in concealing the truth behind the death of Kugan.

(m) Exemplary damages — the court ought to take into account not only the interest of the plaintiff but also the interest of the public as a whole with a view to ensure public bodies or officials do not act unlawfully and do perform their public duties properly, particularly, where the fundamental right of the citizen is concerned. Pray for RM1m having regard to the degree of injuries suffered by Kugan and attempts of police in concealing the truth behind the death of Kugan.

(n) A declaration and vindicatory damages — this is to uphold or vindicate the constitutional rights which have been contravened. This reliefs is important to reflect the sense of public outrage, to emphasis the importance of the constitutional right and the gravity of the breach and to deter breaches.

(o) The plaintiffs claim ought to be allowed and pray for RM300,000 as costs.

**[15]** In support of his submissions, learned counsel for the plaintiff has referred to the following authorities:

(a) *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975;

(b) *Sangaiyya v The State of Tamil Nadu* [2011] 1 MLJ 280;

(c) *Ramanoop v A-G of Trinidad and Tabago* [2005] 2 WLR 1324;

(d) s 7 of the Civil Law Act 1956;

(e) s 8 of the Civil Law Act 1956;

(f) *Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368;

(g) *Suzana bt Md Aris (claiming as administrator of the estate and a dependant of Mohd Anuar bin Sharip, deceased) v DSP Ishak bin Hussin & Ors* [2011] 1 MLJ 107;

(h) *Dunlea v A-G* [2000] 5 LRC 566;

(i) *S Anand Versus State of Tamil Nadu rep by its Secretary to Government, Department of Home, Chennai-9 and Others* [2012] 5 MLJ 772;

(j) *Shri DK Basu, Ashok K Johri v State of West Bengal, State of UP* [1996] SC 2177;

(k) *Common Cause, A Registered Society v Union of India & Ors* [1999] 4 LRI 12; and

(l) *Lai Hie Hua v Lim Teong Yu & Anor* [2008] MLJU 856.

**[16]** In reply to the list of authorities handed by the plaintiff's counsel on the

morning of 29 May 2013, learned senior federal counsel for D1, D3, D4 and D5 relied on his previous submissions and he applied to further submit and submitted, inter alia, as follows:

(a) the court ought not to award damages for false imprisonment, misfeasance of public office, exemplary damages and aggravated damages;

(b) however, learned senior federal counsel agreed with the amount claimed for funeral expenses and parties agreed to RM9,709.70 as funeral expenses. He undertook to send to the court a copy of the order of the Court of Appeal in both the cases of *Borhan bin Hj Daud & 2 lagi v Abd Malek bin Hussin* (Civil Appeal No W-01–122 of 2007) and *Suzana bt Md Aris (claiming as administratrix of the estate and a dependant of Mohd Anuar bin Sharip, deceased) v DSP Ishak bin Hussin & Ors* (Civil Appeal No W-01–402 of 2009) as this court was informed that there were no grounds of judgments provided when both the decisions were given and the appeal was allowed;

(c) as to the costs, learned senior federal counsel proposed the a sum of RM20,000.

**[17]** As to costs, learned counsel for the second defendant, had proposed a sum of RM40,000 in view of the numbers of days the trial had proceeded and the numbers of witnesses who had testified on behalf of D1, D3, D4 and D5.

**[18]** On 14 June 2013, this case was called up for further clarification as a result of further submissions and authorities submitted by learned counsel for the plaintiff on 7 June 2013 and senior federal counsel on 31 May 2013. Learned counsel for the plaintiff had submitted, inter alia, and briefly as follows:

(a) the detention of the deceased become unlawful on the grounds that:

(i) he was detained in an un*gazzetted* lockup and had breached the lockup rules.

(ii) severe assault and battery inflicted were inflicted on the deceased in the course of interrogation.

(b) the application to challenge the legality of detention by habeas corpus is not relevant to the case as the deceased had died in police custody. There is no necessity to challenge the legality of the detention by was of habeas corpus;

(c) the injuries and unlawful killing took place in the course of the deceased's detention and investigation by D2 and other police officers as the degree

of the injury sustained by the deceased shows that the deceased was subjected to numerous acts of torture by D2 and other personnels of D9 of Taipan Police Station;

(d) the entry in the station diary was clearly fabricated by all personnels of D9 of Taipan Police Station including D2. This could not be done without sanction;

(e) there is no case law that the plaintiff cannot claim for exemplary damages under s 7 of the Civil Law Act 1956 since the plaintiff has claimed as the dependent of the deceased;

(f) A copy of the grounds of judgment of the Court of Appeal in *Borhan bin Hj Daud & 2 lagi v Abd Malek bin Hussin* (Civil Appeal No W-01–122 of 2007) which is dated in 25 March 2010 did not decide on the award for exemplary damages.

**[19]** Learned counsel for the plaintiff has referred to the following additional authorities:

(a) *Rajeshkanna a/l Marimuthu v Tn Hj Abd Wahab Hj Kassim (Pengarah Penjara, Johor Bahru, Johor)* [2004] 5 MLJ 155; [2004] 5 CLJ 328;

(b) *Sunil Batra v Delhi Administration* (1978) Cri LJ 1741;

(c) *Three Rivers District Council & Ors v Bank of England* [2001] 2 All ER 513; and

(d) In the High Court of Sabah dan Sarawak at Kuching Suit No 22–218–98 of 2011, *Riga Sdn Bhd v Hj Awang Sepian & 2 Ors.*

**[20]** Learned co-counsel, Mr Bani Prakash for the plaintiff informed this court on 14 June 2013 that a copy of the grounds of judgment dated 25 March 2010 in *Borhan bin Hj Daud & 2 lagi v Abd Malek bin Hussin* (Civil Appeal No W-01–122 of 2007) was only discovered when a search was done by the plaintiff's solicitors at the registry of the Federal Court in reference to the notice of motion for leave to appeal to the Federal Court against the decision of the Court of Appeal given on 25 March 2010.

DECISION

**[21]** Having heard and seen the witnesses closely giving evidence and having examined, considered and evaluated the totality of the written and oral evidence with the documentary evidence which were admitted and upon considering the submissions with the authorities and the research carried out by this court, the decision of this court is:

**[22]** Briefly, the plaintiff's claim arose out of the death of her son, named Kugan a/l Ananthan, (deceased) who died on 20 January 2009 at about 9am at Taipan Police Station. The deceased was arrested on 14 January 2009 by a team of police officers from Taipan Police Station upon the instruction of Inspector Faaezal bin Monir ('DW2'). He was detained at Taipan Police Station, in the district of Subang Jaya from 15 January 2009 until his death on 20 January 2009 for investigation for alleged offence under ss 395 and 397 of the Penal Code. The plaintiff or the family members of the deceased were not informed of the whereabout of the deceased or that he was detained at Taipan Police Station, from the time of his arrest on 14 January 2009 but only after his death on 20 January 2009. As stated, the family of the deceased was only informed of the deceased's whereabout after his death at the Taipan Police Station on 20 January 2009 at about 9am.

**[23]** The assault and battery was committed by D2 on the deceased on 16 January 2009 at about 7am and it was witnessed by Lans Koperal Mohd Haizan bin Hamid ('DW6'). However, the incident of assault and battery on 16 January 2009 at about 7am or between 4am to 8am was not recorded in the station diary (exh D23 (D1, D3, D4 and D5)). For the purposes of this case, this court is unable to accept and it cannot be regarded as the only incident and consequently, limit the injuries found on the deceased and the cause of death to that particular incident committed by D2. The exernal injuries as stated in the first post mortem report ('exh P7') and both the external and internal injuries as stated in the second post mortem report (exh P5) speaks of volume upon considering the totality of the evidence. This court finds the evidence of D1 ('DW1'), Sub Inspector Loh Voon Chye ('DW3'), ASP Rodney Pasla Haris ('DW4') and Lans Koperal Mohd Haizan bin Hamid ('DW6') contradictory, unreliable and inconsistent in several material aspects of the case.

**[24]** Having taken into consideration the totality of the evidence, the reasonable inference to be drawn under the circumstances is that, there has been a systematic series of assault and battery which had proceeded and continued over the period of the deceased's detention and possibly had continued after the assault and battery on the deceased on 16 January 2009 at about 7am (between 4am till 8am) as witnessed by DW6 until his death on 20 January 2009. The grievious injuries on the deceased could not have been caused by D2 only but possibly by other officers and policemen who had access and assigned to interrogate the deceased in accordance with their duty roaster. This court is unable to accept that the injuries inflicted on the deceased and supported by the post mortem reports, particularly, when the second post mortem is taken into account that it was caused solely by D2 on 16 January 2009 at about 7am or between 4am till 8am but must necessarily have been caused by other officers or policemen assigned to interrogate the deceased in accordance with their shift duties under the pretext of 'intensive interogation'.

On the totality of the evidence, this court find there is considerable persuasive force in the submissions of learned counsel for the plaintiff that this case has disclosed a systematic ill treatment, torture and grievious injuries inflicted on the deceased which had caused his death on 20 January 2009 for which the defendants must be found liable.

**[25]** On the factual matrix and the circumstances of the present case, this court finds that the deceased died while he was in the police custody at the Taipan Police Station; due to the grievious injuries inflicted on him as a result of custodial violence during his detention between 15 January 2009 until his death on 20 January 2009. The findings of the pathologist, Dr Prashant N Samberkar with regard to the second post mortem report that the deceased suffered 45 external wounds all over the body, and found several internal injuries and his findings on the cause of death would further corroborate the plaintiffs case that the deceased was brutally assaulted and tortured not just by one officer or D2 alone or due to the one isolated incident, of the tortious act that had occurred on 16 January 2009 at about 7.00am or on the two occasions namely, at 7am and 4pm on 16 January 2009 as contained in the charges against D2 at the criminal trial, (where D2 had been found guilty and convicted of the criminal offence) but series of assault and torture during the period of his detention. D1 who was then the Chief Police Officer of Selangor and D3 as the OCPD of Subang Jaya, now deceased, must take responsibility and cannot be permitted to plead ignorance or disclaim knowledge and place the entire blame for the cause of the deceased's death on D2 as that would be mischievous, unacceptable and against the weight of the evidence. (Rule 3 of the Lockup Rules 1953). In fact, D1 has reiterated that he had directed investigation to be carried out and had limited the investigation to an offence under s 330 of the Penal Code and it was only against D2. Therefore, the contention by learned senior federal counsel for D1, D3, D4 and D5 that the act of D2 was a 'frolic of his own' in order to escape vicarious liability is unacceptable and ought to be rejected. In any event, even if the cause of the deceased's death is related to the tortious act committed by D2, which in the considered view of this court cannot be the case on the totality of the evidence, this court cannot absolve D1, D3, D4 and D5 from liability when considering the totality of the evidence.

**[26]** Be that as it may, notwithstanding the assault and battery by D2 on 16 January 2009 at about 7am as witnessed by DW6 and the particulars of the offence as contained in the first charge, in respect of the criminal case, this court finds there are compelling reasons to find that the entries recorded in the station diary (exh D23 (D1, 3, 4, 5)) between 15 January 2009 till 16 January 2009 and thereafter from 16 January 2009 till the deceased died on 20 January 2009 is a fabrication and a dishonest act on the part of the officers or policemen who had recorded in the station diary that the deceased was in good health

('dalam keadaan baik') is a criminal offence for which no action has been taken against the officers or policemen. The false entries recorded in the Station Diary demands thorough and detailed investigation to be carried out against all the officers who had made and abetted the false entries from 15 January 2009 till 20 January 2009, especially, when there is admission by D1 that there was no formal departmental enquiry or an inquest held for reasons best known to D1 and D3 and, his officers. In this respect, it is important to state that the evidence adduced at the criminal trial must be confined to the date and time framed against D2 as per the charge and evidence involving other officers or incidents of other dates between 15 January 2009 till the deceased's death on 20 January 2009 could not have been successfully admitted in that trial. Merely framing a criminal charge against D2 alone for an offence under ss 330 and 331 of the Penal Code does not reflect the reality of what had happened to the deceased during the period he was in police custody, especially, when considering the grievious injuries found on the deceased and the inconsistent entries as found in the station diary. The entries in the station diary did not reflect the true position, particularly, the entries made after 16 January 2009 till his death on 20 January 2009. The cumulative effect of the cause of death as contained in the second post mortem report and all this conduct would show that the entries made in the station diary, particularly, between 16 January 2009 till 20 January 2009 cannot be the true state of affairs as to the physical and mental condition of the deceased. Therefore, D1, D3, D4 and D5 cannot disclaim liability or plead ignorance by contending that since D2 was charged in court for the criminal offence, the police authorities had completed their investigation on the cause of death of the deceased which is not the case, and is an attempt 'to pool the wool over the eyes' of this court. D1 had admitted that the investigation which he had directed to be carried out under s 330 of the Penal Code was not for the purposes of finding out the cause of the deceased's death but for the criminal act committed by D2 on 16 January 2009 where he had said and D1's evidence is reproduced:

*Peguam Plaintif:*

Jadi Tan Sri setuju dengan saya memandangkan tidak ada apa-apa siasatan dibawah s 302 atau 304 Kanun Keseksaan, maka tidak diketahui apakah yang telah menyebabkan kematian Kugan semasa beliau berada di dalam tahanan polis.

*DW1:*

*Siasatan terhadap Navin telah dibuka di bawah s 330 Yang Arif bukan dibawah 302 atau 304. Kita di dalam kes ini, kita tidak mencari orang yang membunuh Kugan.* (Emphasis added.)

*Peguam Plaintif:*

Jadi yang membunuh Kugan adalah tidak diketahui sehingga hari ini, betul?

*DW1:*

Yang Arif, tidak ada keterangan yang menunjukkan dia dibunuh sebab itu tidak ada kertas siasatan dibawah 302 dibuka.

*Peguam Plaintif:*

Tan Sri, adakah sebab-sebab tertentu disebabkan sekarang, Defendan Kedua berdepan dengan satu pertuduhan di Mahkamah Sesyen dan kini beliau berdepan dengan satu tuntutan di Mahkamah Tinggi berkenaan dengan kematian Kugan. Adakah terdapat apa-apa sebab tertentu mengapa pihak polis tidak membuka apa-apa siasatan di bawah s 302 dan 304 sedangkan telah berlaku satu kematian? Sudah berlaku satu kematian, sepatutnya dibuka jika pihak polis ingin tahu siapakah yang menyebabkan siapa menyebabkan kematian ini, sepatutnya dibuka satu sisatan dibawah s 302 and 304 tapi tidak dibuka. Adakah sebab tertentu mengapa di dalam kes ini kenapa tidak dibuka siasatan dibawah s 302 dan 304?

*DW1:*

Yang Arif, sebab tidak ada keterangan menjuruskan bahawa si mati ini dibunuh untuk kita membuka siasatan dibawah 302 atau 304.

*Peguam Plaintif:*

*Tadi Tan Sri kata siasatan tentang kes kematian Kugan ini diklasifikasikan sebagai s 330 Kanun Keseksaan.* (Emphasis added.)

*DW1:*

*Bukan kes kematian Kugan, tetapi siasatan terhadap salah laku polis dalam kes Kugan ini.* (Emphasis added.)

*Peguam Plaintif:*

Saya terpaksa cadangkan kepada Tan Sri, Tan Sri boleh sahkan atau tidak pada 23 January 2009, Peguam Negara sendiri telah mengeluarkan kenyataan awam dan penyataan kes kematian Kugan akan diklasifikasikan di bawah s 302 Kanun Keseksaan.

*DW1:*

Saya ingat, ya.

*Peguam Plaintif:*

Jadi apa penjelasan Tan Sri Khalid? Peguam Negara sendiri telah keluarkan dengan kenyataan awam.

*DW1:*

Perkara ini telah kita bawa kepada Peguam Negara dan dia setuju untuk siasatan dijalankan di bawah 330 dan bukan 302.

*Mahkamah:*

Tadi peguam tanya ada arahan dari Peguam Negara, kertas siasatan dibuka di bawah s 302

*Plaintiff's counsel interjected:*

'Kenyataan oleh Peguam Negara Sendiri'

*Mahkamah:*

Dinyatakan bahawa siasatan dibuka di bawah s 302. Adakah arahan, Peguam Negara seperti dikatakan oleh peguam plaintif bahawa satu siasatan akan dibuka di bawah s 302 Kanun Keseksaan.

*DW1:*

Ada

*Mahkamah:*

Telah dipatuhi? Ada dibuka kertas?

*DW1:*

Tidak dibuka.

*Mahkamah:*

Tidak dibuka? So tidak dipatuhi arahan Peguam Negara?

*DW1:*

Bukan tidak dipatuhi. *Selepas dia membuat pengumuman itu, pegawai saya telah berunding dengan pihak Peguam Negara supaya siasatan tidak dilakukan di bawah 302 tetapi di bawah s 330* dan pendakwaraya bersetuju dan itu sebabnya kita membuka siasatan di bawah 330. (Emphasis added.)

*Mahkamah:*

Pada masa arahan diterima, siasatan telah pun dijalankan di bawah s 330 is it?

*DW1:*

Saya. *Lepas kita berunding balik dengan Peguam Negara, mereka bersetuju supaya kita meneruskan siasatan di bawah 330.* (Emphasis added.)

**[27]** The deceased was detained for investigation in respect of theft of a motorcar pursuant to a lawful remand warrant granted by the magistrate of the magistrate's court, Petaling Jaya under s 117 of the Criminal Procedure Code. However, the remand warrant was abused where the deceased who was taken in police custody pursuant to the lawful remand warrant was beaten and assaulted by police officers or policemen who had access to the deceased during the intensive interrogation and the grievous injuries must have been deliberately inflicted on the deceased as shown by the post mortem report. Consequently, the detention must be unlawful and necessarily result in false imprisonment as the purpose of the remand warrant had been abused to such an extent that grievous injuries were inflicted on the deceased by the policemen while the deceased was in police custody which had resulted in the deceased's death. It is important to stress that the plaintiff is not questioning the validity of the remand warrant which at the time had been obtained lawfully but the challenge is on the subsequent events when the tortious act were committed and grevious injuries were inflicted on the deceased under the pretext of using the lawful remand warrant and which had resulted in the death of the deceased. If the lawful remand warrant is subjected to abuse and the abuse was to such an extent that there is an element of criminal and tortious acts having been committed during the period of his detention as it happened in the present case, which had resulted in the deceased's death, then the detention, as contended on the plaintiffs behalf would become unlawful. Accordingly, the detention would result in false imprisonment and the plaintiff is entitled to damages when death occurs in police custody as it has, as a matter of fact in the present case.

**[28]** It is important to observe that it is not only to the deceased's family and the public at large that the police officers and the defendants are responsible, but they are also responsible and answerable to the court under whose remand order the deceased was held in police custody to carry out investigation in a lawful manner against the deceased who was suspected of committing theft and surely not to inflict grievious injuries or to cause death to the deceased as it happened in the present case. In this respect, a police officer or for that matter an Investigating Officer who is able to persuade a magistrate to exercise his or her discretion to grant the remand warrant under s 117 of the Criminal Procedure Code is subsequently found to have abused his or her power and use the remand warrant to cause injuries or death to the suspect, in the present case, the deceased, it may tantamount to contempt of court because the remand warrant was issued by the magistrate for a lawful purpose as provided under the law, namely, s 117 of the Criminal Procedure Code but however, if it is found the remand warrant which is a judicial order obtained by an investigating

officer from a magistrate is abused, the investigating officer may be answerable to the magistrate and may tantamount to committing contempt of court. In fact the remand warrant dated 15 January 2009 issued by the magistrate of the Magistrate Court Petaling Jaya had directed the deceased to be detained at the police lockup Petaling Jaya and not at the Taipan Police Station which admittedly did not have a lockup, be it any lockup or *gazetted* lockup. Therefore, and on the factual matrix of this case, this court finds there is a cause of action for false imprisonment which the defendants are liable to the plaintiff. Accordingly, s 32(1) of the Police Act 1967 does not assist the defendants as the acts committed was not done in obedience of the remand warrant issued by the magistrate.

**[29]** While it is not the function of this court to take upon itself and direct on the manner as to how the interrogation, investigation and operation and management of police stations or lockups should be handled or supervised, but, that does not mean that this court must abdicate its judicial function and seen to be wearing blinkers despite the glaring evidence that the cause of the deceased's death in the police custody was caused by brutal and unlawful act by police officers or policemen assigned and entrusted with responsibility to interrogate or investigate a crime under the pretext of having obtained a remand warrant. In this respect, it is important to stress that when this court considers the evidence produced against the police officers who were responsible for the tortious act resulting in the custodial death, it does not do so with a confrontational mind but only to ensure that the statutory duty entrusted to police officers are strictly complied and the due observance of the 'rule of law' and to protect the victims against violation of their basic and fundamental rights and to assist in the realisation of the fundamental constitutional justice. 'Custodial torture or death' is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded especially when it occurs in a police lockup or station and committed by the police officers who are in charge of the law and order, 'civilization takes a step backward-flag of humanity must on each such occasion fly half-mast'.

In *DK Basu v State of West Bengal* AIR (1997) SC 610 at p 615, the Supreme Court said:

> Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts *because it reinforces the belief in the mind of the police that no harm would come to them if an odd prisoner dies in the lockup, because there would hardly be and evidence available to the prosecution to directly implicate them with the torture.* The Courts, must not loose sight of the fact that death in police custody is perhaps on of the worst kind of crime in a a civilised society, governed by the rule of law and poses a serious thereat to an orderly civilised society. (Emphasis added.)

The Courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the case of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of crime has the satisfaction that ultimately the Majesty of Law has prevailed.

Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of a an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purpose full to make the investigation effective. By torturing a person and using their degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

How do we check the abuse of police power? *Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon.* Attention is also required to be paid to properly develop work culture, training and orientation of police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the Constitutional ethos. Efforts must be made to change the attitude and approach of the police personal handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable form of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree methods during interrogation. (Emphasis added.)

**[30]** On the claim of tort of misfeasance, this court finds, there is sufficient evidence to find the tort of misfeasance against the D1 and D3 on the following grounds:

(a) first, there is evidence that D1 had never at any time clarified or corrected his previous statement as to the cause of death of the deceased to the media on 20 January 2009 and 21 January 2009 as contained in *The Star* and *Malaysiakini*;

(b) secondly, the tortious act was committed by D2 and/ possibly by other officers who had access to the deceased on 15 January 2009 till the deceased's death on 20 January 2009. D1 and D3 could not plead ignorance and disclaim knowledge as to the grievious injuries that have been inflicted on the deceased during the period of his detention and this inaction tantamount to abdicating their public duty and attempting to protect the officers and the policemen who had committed tortious act on 15 January 2009 until the deceased's death on 20 January 2009 where

no departmental enquiry was held or any inquest to inquire into the death of the deceased. (Rule 3 of the Lockup Rules 1953);

(c) thirdly, there has been no disciplinary action taken against officers who had made and abetted entries in the station diary every four hours of their rotation duty between 15 January 2009 till 16 January 2009 and between 16 January 2009 and 20 January 2009. The entries which have been found to be false it must have been made with the knowledge or instructions of the superior officers in charge of the Taipan Police Station;

(d) fourthly, the entries in the station diary by the officers during rotation of their duty every four hours have been found to be inconsistent and flies on the face of the grievous injuries found in both the post mortem reports;

(e) fifthly, there are compelling reasons and inference to be drawn that the tortious act committed on the deceased, be it by D2 or other officers responsible was condoned by the officers in charge of the police station and could not have been so openly and boldly written the false entries without the knowledge of the officers. The entries must have been made with the knowledge of Sub Inspector Loh Voon Chye ('DW3'), D3 and ASP Radhuan and other officers or policemen who had made the entries between 15 January 2009 until the deceased's death on 20 January 2009;

(f) sixthly, there is clear admission by DW6 that although he claimed to have witnessed the assault and battery committed by D2 on the deceased on 16 January 2009 after hearing the deceased's scream, he did not enter the incident of assault and battery by D2 in the station diary. In fact he had still continued to write that the deceased was 'dalam keadaan baik';

(g) the grievous injuries found on the deceased as contained in both the post mortem reports, particularly, the second post mortem report could not have been inflicted as a result of the assault and battery by D2 alone on 16 January 2009 but it must have occurred over the period of his detention by a series of assault and battery, be it by D2 and or the other officers who had access to the deceased;

(h) the particulars of the charge expressly states that the serious injuries which was inflicted on the deceased was to obtain confession which confession was for the benefit of the defendants to implicate the deceased with the offence for which he was suspected to have committed;

(i) admittedly, there is a breach of the Lockup Rules 1953, as the Taipan Police Station did not have lockup or a *gazzetted* lockup;

(j) the remand warrant which was obtained from the magistrate for the purposes of investigation has been subjected to abuse of power and with

intent to harm the deceased involving malice, knowledge and intention and had caused grievous bodily injuries on the deceasaed which had caused his death; and

(k) there has been unlawful act in the exercise of power of public officer as an abuse of power and the injuries were inflicted in bad faith, the tortious act had caused the death of the deceased.

**[31]** Departmental enquiry or an inquest was necessary so as to ensure that all relevant facts are 'fully, fairly and fearlessly' investigated and all the relevant facts discovered are exposed to public scrutiny. In the circumstances, it cannot be disputed that whatever investigation, if it was carried out as to how the deceased came about his death would have been 'superficial and slipshod'. Merely changing the duties of officers responsible for the interrogation of the deceased during the custodial period which had resulted in his death to a desk job, with respect, is a mechanical and routine kind of departmental action, if at all it is a departmental or disciplinary action which is ineffective and tantamount, with respect, to hoodwink the deceased's family and members of the public to show that action had been taken against the officers responsible which in fact is ineffective and unreasonable. The action is if at all it was taken to transfer the officer or officers to desk job is irreconcilable when considering the chronology of events and upon considering the gravity of the tortious act and the non-disclosure or suppression of material evidence as stated above. Such mechanical method or routine action even if it is accepted as a disciplinary action, flies in the face of or appears to run flatly counter to the seriousness of the brutal attack and the nature of the grievous injuries inflicted on the deceased and the cause of death as found and contained in the post mortem reports ( ss 74, 78 of the Police Act 1967). Further, the entries that had been made in the station diary by the officers who were on routine 4 hourly duty did not reflect the true state of the deceased's physical condition and the fact that the family members were not informed of the where about of the deceased that he had been in police custody after his arrest on 14 January 2009 and subsequently detained at the Taipan Police Station until he was found dead on 20 January 2009. The family or the deceased was only informed that the deceased was in police custody at Taipan Police Station after the deceased was found dead on 20 January 2009.

**[32]** Therefore, all these matters aforesaid required full investigation and should have been fully explored so as to ascertain the flaws and to eliminate recurrence of such unlawful act by police officers. It is no excuse or defence to say that since D2 has been charged at the session court for a criminal offence under ss 330 and 331 of the Penal Code, there is no requirement or purpose for a departmental enquiry or for that matter, at the very least, there ought to have been an inquest as provided under the Criminal Procedure Code. The reason given for not conducting a departmental enquiry or recommendation for an

inquest is not reasonable and is based on a frivolous ground and with respect, coming from the State Chief Police Officer cannot stand scrutiny when considering the factual matrix of the present case. Failure on the part of the superior police officers in the present case, be it, D1 and D3 to recommend departmental enquiry or an inquest is not open to rationality in terms of responsibility and public duty. A Coroner's inquest is conducted in a transparent fashion to ascertain and ensure that the controversial death, as in the present case, were independently and fully investigated in a public forum and it would be a flexible process. (*R v Inner West London Coroner ex p Dallaglio* [1994] 4 All ER 139, *R (on the application of Middleton) v West Somerset Coroners* [2004] 2 AC 182).

**[33]** The nature and scope of the criminal trial against D2 and a formal disciplinary and departmental enquiry and an inquest has different and separate functions. Therefore, the fact that D2 had been charged for an offence under ss 330 and 331 of the Penal Code for the incident on 16 January 2009 is not a good ground to dispense with formal disciplinary and departmental and enquiry or an inquest which would prevent recurrence of such fatality. Had an inquest or department enquiry been held, it could have been directed to an investigation agency to ascertain 'by what means the deceased came by his death or how the deceased came by his death and when and how the injuries were inflicted and whom and how both the internal and external injuries as found in the post mortem reports' could have been determined. Being complacent by merely framing a criminal charge under ss 330 and 331 of the Penal Code against D2 alone in respect of the incident on 16 January 2009 is not sufficient to deal with the cause of death of the deceased which flies in the face of several injuries and the findings of the pathologist which no doubt must have been to quieten the public outcry that there was supposedly no cover up. In a cases of a custodial death and where the deceased is found to have died as a result of the injuries inflicted on him voluntarily and as a deliberate act, it calls for a full departmental enquiry or at the very least an inquest provided under the Criminal Procedure Code and nothing less or short of that will eliminate the distrust and confidence in the police officers that 'something was rotten' at Taipan Police Station between 15 January 2009 until the time of the deceased's death on 20 January 2009 and to assert and testify in court that there was no cover up is another attempt to ask this court to *cover up* the evidence in court which has to be rejected outright as it is against the weight of the evidence.

In *Ashley v Chief Constable of Sussex Police* [2007] 1 WLR 398, Lord Newberger of Abbotsbury observed:

(a) There were two inquiries into the shooting of the deceased, one was carried out by an independent police force under the Police Act 1996 and the other by the Sussex police authority itself for the benefit of the deceased's family.

(b) There was also an unqualified public apology to the deceased's family delivered in person by the Chief Constable and the Chairman of the authority.

Unfortunately, none of this course as in *Ashley v Chief Constable of Sussex Police* was taken by the police authorities in the present case.

**[34]** In so far as this court is concerned, it is plain and simple that had only the plaintiff not been able to have the second post mortem conducted on the deceased and obtain the said post mortem report through the timely intervention of Mr N Surendran ('PW1'), the truth of the deceased's physical condition and the cause of death would not have surfaced or come to light and probably swept below the 'blue carpet' and that would have resulted in a black day for justice. If D1 had genuinely intended to be transparent in his action and there was no cover up as he seems to have repeatedly said to the media, surely, he should have been the first person to initiate detail investigation to inquire into the cause of the deceased's death which occurred on 20 January 2009 at Taipan Police Station and not wait until the plaintiff had lodged the police report on 21 January 2009 and be selective in his action. Further, D1 should have taken the initiative to clarify his previous two statements to the media as to the cause of the deceased's death. In addition, this court finds that D1 had also:

(a) unilaterally and arbitrarily directed to open up investigation papers under s 330 of the Penal Code which has no direct relevance to the cause of death of the deceased;

(b) further and admittedly, D1 had through the assistance of D3 managed to persuade the Attorney General to confine the investigation for an offence under s 330 and not s 302 of the Penal Code when the investigation ought to have been commenced under s 302 or at least s 304 of the Penal Code;

(c) as admitted by D1, the attorney general had directed that the investigation with regard to the deceased's death be carried out under s 302 of the Penal Code. However, D1 had testified that *upon negotiation with the Attorney General,* the investigation was confined to s 330 of the Penal Code; (Emphasis added.)

(d) despite the grievous nature of the injuries inflicted on the deceased and the cause of death of the deceased as found by Dr Prashant N Samberkar the pathologist, D1 had arbitrarily and at his whim and fancy directed investigation to be carried out under a lesser offence under s 330 and not even s 331 of the Penal Code.

For easy reference, the relevant offences under the Penal Code are reproduced:

*299 Culpable homicide.*

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

*300 Murder*

Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

(d) if the person committing the act knows that it is imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

*302 Punishment for murder*

Whoever commits murder shall be punished with death.

*330 Voluntarily causing hurt to extort confession or to compel restoration of property*

*Whoever voluntarily causes hurt for the purpose of extorting* from the sufferer, *or from any person interested* in the sufferer, *any confession or any information which may lead to the detection of an offence* or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine, (Emphasis added.)

*331 Voluntarily causing grievous hurt to extort confession or to compel restoration of property*

Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from, any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of

any property or valuable security, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.

**[35]** Upon considering the conduct of D1 from the time he gave the first statement to the media on 20 January 2009 and the second statement on 21 January 2009 as to the cause of the deceased's death, his direction to confine the investigation to an offence under s 330 and not s 302 as directed by the attorney general or ss 304 or even 331 of the Penal Code, his unwillingness to correct or clarify his two previous statements to the media and upon examining his evidence in court, the cummulative effect would be that D1 had right from the beginning showed no genuine interest or sympathy to find out the truth as to who was responsible for the deceased's death on 20 January 2009 when the deceased was in police custody at the Taipan Police Station where he was the State Chief Police Officer except to have provided 'lip service' that a thorough investigation will be carried out on the death of the deceased. In fact under cross-examination by learned counsel for the plaintiff, D1 had said, where the relevant part of his evidence is reproduced:

*Peguam Plaintif:*

Now Tan Sri, kita berdepan dengan satu insiden dimana terdapat kematian dalam tahanan. Adakah sebab tertentu mengapa pihak polis tidak membuka kertas siasatan dibawah s 302 atau 304 Kanun Keseksaan?

*DW1:*

Yang Arif, apa juga tindakan kita, membuka kertas siastan adalah berdasarkan kepada laporan pegawai perubatan. Post mortem. Jadi kebiasaanya apabila mendapat laporan post mortem yang mengesahkan sebab-sebab punca kematiannya, kertas siasatan mengejut akan dibuka apabila tidak ada unsur-unsur jenayah yang dilaporkan di dalam post mortem.

*Peguam Plaintif:*

Jadi Tan Sri setuju dengan saya memandangkan tidak ada apa-apa siasatan dibawah s 302 atau 304 Kanun Keseksaan, maka tidak diketahui apakah yang telah menyebabkan kematian Kugan semasa beliau berada di dalam tahanan polis.

*DW1:*

Siasatan terhadap Navin telah dibuka di bawah s 330 Yang Arif bukan dibawah 302 atau 304. Kita di dalam kes ini, kita tidak mencari orang yang membunuh Kugan.

*Peguam Plaintif:*

Jadi yang membunuh Kugan adalah tidak diketahui sehingga hari ini, betul?

*DW1:*

Yang Arif, tidak ada keterangan yang menunjukkan dia dibunuh sebab itu tidak ada kertas siasatan dibawah 302 dibuka.

*Peguam Plaintif:*

Tan Sri, adakah sebab-sebab tertentu disebabkan sekarang, Defendan Kedua berdepan dengan satu pertuduhan di Mahkamah Sesyen dan kini beliau berdepan dengan satu tuntutan di Mahkamah Tinggi berkenaan dengan kematian Kugan. Adakah terdapat apa-apa sebab tertentu mengapa pihak polis tidak membuka apa-apa siasatan di bawah s 302 dan 304 sedangkan telah berlaku satu kematian? Sudah berlaku satu kematian, sepatutnya dibuka jika pihak polis ingin tahu siapakah yang menyebabkan siapa menyebabkan kematian ini, sepatutnya dibuka satu sisatan dibawah s 302 and 304 tapi tidak dibuka. Adakah sebab tertentu mengapa di dalam kes ini kenapa tidak dibuka siasatan dibawah s 302 dan 304?

*DW1:*

Yang Arif, sebab tidak ada keterangan menjuruskan bahawa si mati ini dibunuh untuk kita membuka siasatan dibawah 302 atau 304.

*Peguam Plaintif:*

Baik, saya terpaksa cadangkan kepada Tan Sri, Tan Sri boleh sahkan atau tidak pada 23 January 2009, Peguam Negara sendiri telah mengeluarkan kenyataan awam dan meyatakan kes kematian Kugan akan diklasifikasikan di bawah 302 Kanun Keseksaan.

*DW1:*

Saya ingat, Yang Arif. Ya.

Re examination

*Peguam Kanan Persekutuan:*

Dan Tan Sri juga telah ditanya bahawa berdasarkan report tersebut seolah-olah Tan Sri telah cuba untuk membuat satu cover up atas tindakan pihak polis dan jawapan Tan Sri adalah tidak setuju. Boleh Tan Sri jelaskan kenapa?

*DW1:*

Tidak sekali-kali saya pernah membuat apa-apa cover up terhadap apa-apa perkara Yang Arif terutamanya melibatkan pegawai polis, Yang Arif.

**[36]** Based on the factual matrix, and upon considering the chronology of

events in respect of both pre and post second post mortem until the quick and timely intervention of Mr N Surendran (PW1), who must be commended for being instrumental and protector of human rights, especially, when emotions and anxieties was so obvious and high at the material time. In this respect, it is also important to reiterate that the remand warrant issued by the magistrate has ordered the deceased to be detained at the lockup, Petaling Jaya and not at the Taipan Police Station and there is a clear breach of the remand warrant and arguably the detention at the Taipan Police Station would also tantamount to an illegal detention. In fact the magistrate is entitled to demand for the progress of the investigation for which the magistrate had issued a remand warrant to carry out investigation.

**[37]** It is interesting to note that D1 seems to have assumed the function of the investigating officer, by insisting that there is no evidence to show that the deceased was murdered. In order to ascertain whether the deceased was murdered and who was responsible for his death and how the death had occurred in police custody at Taipan Police Station, surely, there must be an investigation carried out under s 302 of the Penal Code based on the second post mortem report. Accordingly, it is only after an investigation had commenced that the investigating officer may be able to collect evidence to find out if there is a case for an offence under s 302 of the Penal Code and upon completion of the investigation, he would be able to refer the investigation papers to the public prosecutor for directions in respect of any possible criminal prosecution on the deceased's death in police custody and D1 cannot at his whim limit the investigation to an offence under s 330 of the Penal Code. In the present case, there is no reasonable explanation for the following matters:

(a) Why D1 had limited the investigation to an offence under s 330 of the Penal Code?

(b) Why D1 did not comply with the direction of the attorney general to open up investigation papers under s 302 of the Penal Code?

(c) Why D1 did not direct a formal departmental enquiry into the death of the deceased bearing in mind the nature of the injuries and the cause of his death?

(d) Why was there no positive action taken to ensure there is at least an inquest held to inquire into the cause of death of the deceased and the person or persons responsible for the death?

(e) Why D1 did not clarify his previous two statements to the media supposedly the deceased died of a natural cause despite the second post mortem report which had disclosed 45 external injuries and other internal injuries and the cause of death which is due to the grievous injuries found on the deceased. Surely, the cummulative effect and the combination of the above matters would have required a thorough and

detail investigation to be carried out to ascertain who had caused the deceased's death and not to brush aside the possibility of an offence under s 302 or s 304 of the Penal Code which are matters for the investigating officer and the attorney general and it is not for D1 to perform the function of the investigating officer or attorney general as it happened in the present case except for the reason to cover up the truth of the cause of action of the deceased's death in police custody?

(f) D1 was even able to say that the other officers or the policemen did not contravene any regulations and therefore no action was taken against any other officer or policemen who were involved in the interrogation of the deceased.

(g) Why the deceased was detained in Taipan Police Station when there is no *gazetted* lockup or lockup and bearing in mind that the remand warrant issued by the magistrate was to detain the deceased at the lockup, Petaling Jaya?

(h) Why was there no investigation carried out against the policemen who had made the entries in the station diary that the deceased 'dalam keadaan baik' until his death on 20 January 2009 considering the grievous nature of the injuries and the cause of death as per the second post mortem report?

(i) Why DW6 did not record in the station diary that he had witnessed D2 assaulting the deceased on 16 January 2009 at about 7am?

(j) Why DW6 did not inform his superior officers or Sub Inspector Loh Voon Chye ('DW3') immediately of the assault and battery by D2 and there is no criminal proceeding against DW6 for failing to lodge a police report of the crime committed at the police station by D2?

**[38]** In the circumstances and on the factual matrix of the present case, this court is not persuaded to accept or find that there is no cover up as to the cause of the deceased's death for the reasons stated above. In fact it would appear that to date D1 or any of the defendants have not been able to inform the plaintiff as to how the deceased died while in police custody. On the other hand, there is a chain of evidence to draw an inference coupled with the findings of the pathologist in the second post mortem report that on the balance of probabilities it was not only D2 who had inflicted the grievous injuries on the deceased but possibly other policemen or officers who were involved in the intensive interrogation and on other dates following the duty roaster during the period when the deceased was in police custody at Taipan Police Station. Police officers who are custodian of law and order should not violate with impunity and stoop to such brutal attack on a defenseless detainee as in the present case, the deceased, who was in the hands of police officers. Police officers should also

not be seen to remain as silent spectators or pervert the truth to save their colleagues as is likely to bring discredit on the reputation of the police force who perform public service.

**[39]** As for D1, if he was truly serious in his statement to the media on 21 January 2009 that there will be no cover up he should have rightfully, with respect, called or recommended for a formal departmental enquiry to probe into the custodial death of the deceased, especially, when he already had the information of the serious and grievous nature of injuries inflicted on the deceased after the second post mortem report was available which he ought to have known. This course of action would have enabled the investigation agency to probe into the cause of the custodial death. In addition, it would have been able to ascertain the role and duties performed by each and every officer assigned to the investigation and interrogation and who were in charge or had conducted the interrogation and those responsible for the false entries recorded in the station diary between 16 January 2009 till the deceased's death 20 January 2009 irrespective of their rank, where the entries did not reflect on the true state of the deceased's physical condition as found by the pathologist, Dr Prashant N Samberkar. This departmental enquiry or inquest, perhaps, would have cleared the dust which remains unsettled.

**[40]** Be that as it may, on the totality of the evidence, and considering the extent of the cover up and the fact there had been no formal disciplinary enquiry or disciplinary action taken against the officers or the policemen who had made and abetted the false entries in the station diary, there are compelling reasons on the balance of probabilities that the false entries in the station diary had been authorised or condoned by the superior officers. In the circumstances, this court finds that D1 and D3 have committed the tort of misfeasance and must be prepared to accept responsibility for the intended tortious act of misfeasance in public office. (*Three Rivers District Council and Others v Bank of England (No 3)* [2001] 2 All ER 513 and applied in *Riga Sdn Bhd v Haji Awang Sepian Haji Awang Joini* (Kuching High Court, Civil Suit No 22–218–1998–11) (Unreported). The evidence of D2 that he had been made 'the scapegoat' by D3 cannot be totally rejected as not probable. On the other hand, the fact remains that D2 did not disclose this incident of the private meeting held at the instance of D3 during his trial at the criminal case. However, the unofficial meeting which was called by D3 is supported by the evidence of DW6 but for his reluctance and fear to disclose to the court what had transpired, discussed and the instruction given by D3 at the meeting which has been conveniently forgotten by DW6.

**[41]** Suppression or withholding of material evidence, to cover up an unlawful act or series of unlawful act, particularly, at the police station or lockup in any trial or proceeding which may assist the court, if it is disclosed to

ascertain the truth and to arrive to at a just decision, would be the worst tainted evidence in any trial or proceeding. What matters most to this court is the manifest truth and not suppression or withholding of material evidence as it violates the fundamental principles of justice and smacks of dishonesty and unprofessionalism of the highest order. On the factual matrix of the present case, it would have been better for D1 to have corrected or clarified the versions given by him to the media on 20 January 2009 and on 21 January 2009 than to persist and maintain his version as given to the media as the cause of death which was apparent and ought to have known to him that the version given by him to the media was not worthy of consideration and flies across the truth. D1's statement to the media on 20 January 2009 and as published in *The Star* newspaper on 21 February 2009 (exh P29) was that *'the deceased had asked for a glass of water and then collapsed and died'*. Whereas the first post mortem report dated 24 February 2009 from Dr Abdul Karim bin Hj Tajuddin the Pathologist from Serdang Hospital contain 22 categories of external wounds and the cause of death is stated 'pulmonary edema' (exh P7). The second post mortem report of Dr Prashant N Samberkar of the University Hospital (exh P5) contains 45 categories of external injuries and also internal injuries. In the second post mortem report (exh P5), the cause of death is stated as 'acute renal failure due to rhabdomyolysis due to blunt trauma to skeletal muscles', in other words, failure to the renal system. Whereas the second statement by D1 to the media on 21 January 2009 is that the deceased died due to water in the lungs. Further, the charge framed against D2 is limited to an offence under s 330 and s 331, in brief, for causing hurt and grievous hurt respectively to extract confessions on 16 January 2009 at 7am and at 4pm.

**[42]** The inevitable effect of suppressing the truth from this court would be to undermine the judicial authority and ability of this court in performing its judicial function to ascertain the truth on the plaintiff's claim and upon considering the defences pleaded and to arrive at a just finding. Therefore, the evidence of D1 when considered together with the evidence of DW3, DW4 and DW6 tantamounts to suppression of evidence which has its legal consequences but perhaps, in the belief or hope that his evidence will not find place on the findings of this court. This court wishes to state that no person, be it in any position, status or rank, when testifying in court should take this court for granted and attempt to suppress the truth with the view to escape liability just because the witnesses, being interested persons, will not meet the deceased 'with a lie in their mouth' as there is no opportunity of testing the truth. However, the officers and D1 must be reminded that their conduct and solution, 'lies not in the cold print of the statute book but in the integrity and conscience of every police officer' whatever be his rank.

**[43]** In addition, this court finds that there are several glaring material contradictions between D1 and *Pemangku* DSP Mohd Marzukhi bin Mohd

Mokhtar ('DW5') in respect to the investigation which was carried out upon the death of the deceased. D1's evidence is reproduced:

(a) there was no investigation papers opened under ss 302 or 304 of the Penal Code (tidak ada kertas siasatan dibawah 302 atau 304 dibuka);

(b) investigation against the second defendant was carried out under s 330 of the Penal Code and not under ss 302 or 304. Further, in the present case, the police did not look for the person who had murdered the deceased. (Siasatan terhadap Navind telah dibuka di bawah s 330, bukan di bawah 302 atau 304. Kita di dalam kes ini, kita tidak mencari orang yang membunuh Kugan);

(c) There is no evidence to show that the deceased was murdered and that was the reason why no investigation papers was opened under s 302. (Tidak ada keterangan yang menunjukkan dia dibunuh sebab itu tidak ada kertas siasatan di bawah 302 dibuka);

(d) Investigation was not carried out under s 302 and s 304 of the Penal Code. (Sebab tidak ada keterangan menjuruskan bahawa si mati ini dibunuh untuk kita membuka siasatan di bawah 302 atau 304);

(e) After he was informed of the police report lodged by the deceased' mother, the plaintiff, he had directed investigation to be carried out under s 330 of the Penal Code (selepas laporan ibu … selepas saya dimaklumkan tentang laporan ibu mendiang, saya telah mengarahkan siasatan di bawah s 330 Kanun Keseksaan dijalankan);

(f) He had directed an investigation to be carried out under s 330 of the Penal Code about one day after he was informed of the police report lodged by the deceased's mother, the plaintiff;

**[44]** In answer to further cross-examination by Mr R Sivarasa, learned lead counsel for the plaintiff, D1 had testified as follows:

*Peguam plaintif:*

Tadi Tan Sri kata siasatan tentang kes kematian Kugan ini diklasifikasikan sebagai s 330 Kanun Keseksaan

*DW1:*

Bukan kes kematian Kugan, tetapi siasatan terhadap salah laku polis dalam kes Kugan ini

*Peguam plaintif:*

Saya terpaksa cadangkan kepada Tan Sri, Tan Sri boleh sahkan atau tidak pada 23 January 2009, Peguam Negara sendiri telah mengeluarkan kenyataan awam dan penyataan kes kematian Kugan akan diklasifikasikan di bawah s 302 Kanun Keseksaan.

*DW1:*

Saya ingat, ya.

*Peguam plaintif:*

Jadi apa penjelasan Tan Sri Khalid? Peguam Negara sendiri telah keluarkan dengan kenyataan awam.

*DW1:*

Perkara ini telah kita bawa kepada Peguam Negara dan dia setuju untuk siasatan dijalankan di bawah 330 dan bukan 302.

*Mahkamah:*

Tadi peguam tanya ada arahan dari Peguam Negara, kertas siasatan dibuka di bawah s.302

*Plaintiff's counsel interjected:*

'Kenyataan oleh Peguam Negara Sendiri'

*Mahkamah:*

Dinyatakan bahawa siasatan dibuka di bawah s 302. Adakah arahan, Peguam Negara seperti dikatakan oleh peguam plaintif bahawa satu siasatan akan dibuka di bawah s 302 Kanun Keseksaan

*DW1:*

Ada

*Mahkamah:*

Telah dipatuhi? Ada dibuka kertas?

*DW1:*

Tidak dibuka.

*Mahkamah:*

Tidak dibuka? So tidak dipatuhi arahan Peguam Negara?

*DW1:*

Bukan tidak dipatuhi. Selepas dia membuat pengumuman itu, pegawai saya telah berunding dengan pihak Peguam Negara supaya siasatan tidak dilakukan di bawah 302 tetapi di bawah s 330 dan pendakwaraya bersetuju dan itu sebabnya kita membuka siasatan di bawah 330. (Emphasis added.)

*Mahkamah:*

Pada masa arahan diterima, siasatan telahpun dijalankan di bawah s 330 is it?

*DW1:*

Saya. Lepas kita berunding balik dengan Peguam Negara, mereka bersetuju supaya kita meneruskan siasatan di bawah 330

**[45]** Whereas Acting DSP Mohd Marzuki bin Mohd Mokhtar (DW5) under cross-examination by Cik Latheefa Koya, learned co-counsel for the plaintiff had testified and his evidence is reproduced:

*PEGUAM PLAINTIF (LK):*

Selain daripada ACP Omar ada tak DSP perlu membuat laporan siasatan ataupun melaporkan kepada mana-mana pihak atau pegawai yang lain?

*DW5:*

Dari semasa ke semasa sekiranya diminta oleh pegawai atasan

*PEGUAM PLAINTIF (LK):*

Adakah DSP sendiri terus maklumkan kepada Datuk Sarta ini ataupun melalui ACP Omar?

*DW5:*

Ada kalanya ACP Omar ada kalanya secara terus apabila ditanya.

*PEGUAM PLAINTIF (LK):*

DSP telah mengatakan bahawa DSP diminta untuk membuat siasatan terhadap Kugan ini. Apakah asas penyiasatan ini? Adakah menerusi arahan dari pegawai atasan ataupun berdasarkan satu laporan?

*DW5:*

Berdasarkan pada arahan yang diterima.

*PEGUAM PLAINTIF (LK):*

Siapa yang memberi arahan tersebut?

*DW5:*

ACP Omar Mahmah.

*PEGUAM PLAINTIF (LK):*

Apakah arahan tersebut? Bagaimanakah arahan tersebut berbunyi?

*DW5:*

Untuk saya mengambil alih kertas siasatan daripada pegawai siasatan yang asal.

*PEGUAM PLAINTIF (LK):*

Beliau yang memberi arahan bahawa siasatan in harus dilakukan di bawah s 330?

*DW5:*

Saya percaya sebegitu.

*PEGUAM PLAINTIF (LK):*

Saya merujuk kepada jawapan kamu di ms 3 jawapan kepada soalan 13. Kamu telah menyatakan bahawa 'Saya telah jumpa ASP Zainal &boleh DSP beritahu apakah dokumen-dokumen yang dimaksudkan?'

*DW5:*

Dokumen yang dimaksudkan adalah kertas siasatan bagi kes tersebut.

*PEGUAM PLAINTIF (LK):*

Apa yang terkandung dalam kertas siasatan tersebut?

*DW5:*

Laporan Polis kematian Kugan.

*PEGUAM PLAINTIF (LK):*

Oleh siapa laporan polis tersebut?

*DW5:*

Saya tak ingat.

*PEGUAM PLAINTIF (LK):*

Saya cadangkan adakah ini laporan polis yang dibuat oleh ASP Rodney?

*DW5:*

Ya.

*PEGUAM PLAINTIF (LK):*

DSP beritahu bahawa DSP telah membuat siasatan dibawah s 330. Boleh DSP beritahu apakah dapatan dalam proses siasatan itu?

*DW5:*

Sewaktu siasatan dijalankan saya telah menerima arahan untuk meriklasifikasikan kes tersebut dibawah s 302 kanun keseksaan dan meneruskan siasatan dibawah s 302.

*PEGUAM PLAINTIF (LK):*

Siapa yang memberi arahan itu?

*DW5:*

Arahan diterima daripada Ketua Jabatan Siasatan Jenayah Ibu Pejabat Polis Kontigen Selangor, Dato Hasnan bin Hassan

*PEGUAM PLAINTIF (LK):*

Bila arahan tersebut dibuat?

*DW5:*

Exact date saya tak ingat. Kalau tak silap 23hb Januari.

*PEGUAM PLAINTIF (LK):*

Apa sebab arahan itu dibuat untuk direklasifikasikan kepada s 302?

*DW5:*

Untuk menyiasat jika terdapat unsur-unsur bunuh di dalam kes tersebut.

*PEGUAM PLAINTIF (LK):*

Soalan saya, dalam proses membuat siasatan bawah s 330, kamu tiba-tiba dapat arahan untuk menukar kepada s 302. Apa yang menyebabkan kamu terpaksa membuat siasatan, apakah bukti-bukti yang menunjukkan..

*Mahkamah:*

Saksi sudah cakap dia dapat arahan daripada Dato Hasnan.

*PEGUAM PLAINTIF (LK):*

Apa yang kamu telah lakukan setelah mendapatkan arahan untuk menklasifikasikan?

*DW5:*

*Saya siasat kes tersebut dibawah s 302.* (Emphasis by this court.)

*PEGUAM PLAINTIF (LK):*

Apa yang telah kamu lakukan?

*DW5:*

Mendapatkan keterangan-keterangan bagi menentukan sekiranya mendapatkan unsur-unsur s 302 Kanun Keseksaan di dalam kes tersebut.

*PEGUAM PLAINTIF (LK):*

Bagaimana kamu mendapatkan keterangan-keterangan?

*DW5:*

Daripada saksi-saksi di tempat kejadian dan juga dokumen-dokumen.

*PEGUAM PLAINTIF (LK):*

Bolehkah DSP beritahu siapakah saksi-saksi yang telah kamu soalsiasat atau dapatkan keterangan?

*DW5:*

Saksi-saksi yang bertugas di cawangan D9 IPD Subang Jaya dan saksi yang menerima Kugan sewaktu di dalam lockup. Saksi di Mahkamah sewaktu proses remand. Dan ramai saksi lagi saya tak dapat ingat semua sekali.

*PEGUAM PLAINTIF (LK):*

Dalam proses siasatan tersebut berapa ramaikah saksi yang telah menyoal siasat Kugan?

*DW5:*

Anggota Cawangan D9 IPD Subang Jaya, kalau tak silap saya 11 orang.

*PEGUAM PLAINTIF (LK):*

Merujuk balik kepada DI, Ikatan warna Oren. Sila lihat m/s 1. Dan seterusnya lihat m/s 2 terdapat jadual anggota-anggota. Mukasurat 2 secara khusus ada tarikh-tarikh jadual soal siasat. Apakah DSP telah menyoal siasat kesemua nama-nama pegawai-pegawai yang terlibat dalam soal siasat Kugan yang tersenarai seperti di sini.

*DW5:*

Ya. Semua

*PEGUAM PLAINTIF (LK):*

Apakah hasil dapatan daripada soal siasat tersebut?

*DW5:*

Hasil daripada siasatan yangn dijalankan dapati Konstable Navindran ada mendatangkan cedera kepada Kugan pada tarikh 16hb Januari 2009.

*PEGUAM PLAINTIF (LK):*

Bagaimana DSP terus mendapati bahawa Konstable Navin yang mendatangkan cedera kepada Kugan?

*DW5:*

Berdasarkan siasatan saya keatas anggota-anggota yang bertugas di cawangan D9.

*PEGUAM PLAINTIF (LK):*

Selain daripada diberitahu oleh anggota-anggota lain yang bekerja di D9, apakah yang menyebabkan DSP terus mendapati Konstable Navin yang telah mendatangkan kecederaan?

*DW5*

Berdasarkan kesiasatan saya ke atas anggota-anggota cawangan D9.

*PEGUAM PLAINTIF (LK):*

Soalan saya, selain daripada mendapat keterangan daripada anggota anggota D9 apakah keterangan-keterangan lain yang menyebabkan DSP terus menjurus kepada constable Navin.

*DW5:*

Tidak ada keterangan lain

*PEGUAM PLAINTIF (LK):*

Hanya pada keterangan pegawai-pegawai lain?

*DW5:*

Ya.

*PEGUAM PLAINTIF (LK):*

Boleh DSP beritahu apakah keterangan yang dimaksudkan daripada pegawai anggota-anggota lain?

*DW5:*

Secara spesifik saya tidak ingat apa yang dikatakan. Tetapi mereka mengatakan bahawa mereka ada nampak Konstable Navindran memukul Kugan.

*PEGUAM PLAINTIF (LK):*

DSP sebagai seorang pegawai penyiasat ditugaskan untuk menbuat satu dapatan sebelum menghantar untuk kertas pertuduhan?

*DW5:*

Ya.

*PEGUAM PLAINTIF (LK):*

Jadi selain daripada keterangan daripada pegawai lain adakah DSP melihat apa jenis kecederaan yang dilakukan, apa sebenarnya kecederaan yang dibuat atau dituduh terhadap Navin. Apakah kecederaan yang dilakukan terhadap Kugan?

*DW5:*

Melihat pada gambar, ya.

*PEGUAM PLAINTIF (LK):*

Gambar apa yang dilihat?

*PEGUAM PLAINTIF (LK):*

Luka jenis apa? DSP saya merujuk juga kepada m/s 5 - 7 Bundle B di mana tertera pertuduhan terhadap Konstable Navin. Cuba lihat pertuduhan bahawa kamu pada 16hb telah dengan sengaja menyebabkan kecederaan parah Soalan saya ialah apa dia kecederaan parah? Dan cedera di mana?

*DW5:*

Di bahagian belakang badan ada kesan kecederaan

*PEGUAM PLAINTIF (LK):*

Kesan-kesan luka? Terangkan, butirkan apa jenis kecederaan kesan-kesan luka tersebut? Kamu siasat dan pertuduhan telah dilakukan bahawa terdapat cedera parah. Jadi boleh ceritakan?

*DW5:*

Kesan luka yang dalam pada badan oleh senjata yang tidak diperolehi

*PEGUAM PLAINTIF (LK):*

Adakah kecederaan itu dilakukan dengan tangan?

*DW5:*

Siasatan mengatakan bahawa ada senjata yang digunakan tetapi tidak ada senjata yang diperolehi.

*PEGUAM PLAINTIF (LK):*

Apa jenis senjata?

*DW5:*

Mengikut keterangan dari pakar pathology, berkemungkinan sesuatu seperti getah paip yang digunakan.

*PEGUAM PLAINTIF (LK):*

Saya tidak tanya soalan apa yang didapati oleh pakar patholoqy. Saya tanya kamu sebagai pegawai penyiasat yang telah mengambil keterangan daripada pegawai-pegawai terlibat yang mengatakan telah melihat bahawa Konstable Navin telah melakukan kecederaan. Jadi apakah senjata yang digunakan terhadap Kugan?

*DW5:*

Getah paip.

*PEGUAM PLAINTIF (LK):*

Adakah kamu telah diberitahu bagaimana dan sehingga berapa kali getah paip itu digunakan terhadap Kugan? Sehingga menyebabkan cedera parah.

*DW5:*

Tidak.

*PEGUAM PLAINTIF (LK):*

Dan kamu tidak mendapati jawapan?

*DW5:*

Ada kepelbagaian dalam jawapan dan masing-masing tidak dapat menyatakan secara spesifik berapakah pukulan telah diterima dan telah dibuat

*PEGUAM PLAINTIF (LK):*

Merujuk kepada D1, senarai jadual penugasan anggota. Siapakah pegawai-pegawai yang telah melihat Kugan telah dicederakan?

*DW5:*

Saya tidak ingat keempat-empat orang. Tetapi yang pastinya Haizan anggota polis di m/s 2. Kalau tak silap saya Junit, tapi tak pasti sekarang. Saya tak nyatakan, tak ingat lagi tiga orang itu siapa.

*PEGUAM PLAINTIF (LK):*

Apa telah dicadangkan oleh DSP dalam kertas siasatan? Apa jenis kesalahan yang telah dicadangkan?

*DW5:*

Tak dapat saya ingat apa yang saya tulis dalam minit itu. Tetapi setelah cadangan diberikan pertuduhan telah mendapat arahan untuk menuduh Navindran di bawah s 331 Kanun Keseksaan.

*PEGUAM PLAINTIF (LK):*

Menerima arahan daripada siapa?

*DW5:*

Jabatan Peguamcara Negara.

*PEGUAM PLAINTIF (LK):*

Kamu adalah pegawai penyiasat dan kamu telah membuka siasatan di bawah s 302 dan setelah mendapat maklumat dan sebagainya apakah yang dicadangkan. Kenapa kamu cadangkan s 331, setelah kamu membuat penyiasatan di bawah s 302?

*DW5*

Tidak ada sebarang unsur s 302 dalam siasatan saya untuk saya cadangkan di bawah s 302 sebab itu saya menjalankan siasatan.

*PEGUAM PLAINTIF (LK):*

Apa jenis unsur yang kamu perlukan untuk membuat cadangan s 302? Adakah terdapat kematian?

*DW5:*

Bagi menerangkan bahawa terdapatnya sesuatu tindakan yang menyebabkan kematian keatas Kugan. Dalam siasatan tidak menunjukkan ada sebarang tindakan yang dibuat oleh mana-mana pihak dan menyebabkan kematian Kugan.

*PEGUAM PLAINTIF (LK):*

Rujuk kepada laporan Bedah Siasat m/s 18 Bundle C secara spesifik ini adalah dapatan daripada post mortem yang kedua. Cuba lihat dapatan di ayat terakhir sebelum tandatangan. Cuba DSP beritahu maksud dapatan tersebut.

*DW5:*

Kegagalan fungsi buah pinggang kerana eropto milasys. Kerana blunt trauma to skeletal muscles

*PEGUAM PLAINTIF (LK):*

Siasatan tidak membawa kepada kematian, menunjukkan?

*DW5:*

Sesiapa menyebabkan kematian tetapi siapa yang menyebabkan kecederaan

*PEGUAM PLAINTIF (LK):*

Kamu tidak tanya apa-apa soalan berkenaan itu?

*DW5:*

Saya tidak dapat ingat semua soalan yang saya tanya pada pakar pathologi pada masa itu

*PEGUAM PLAINTIF (LK):*

Adakah mereka mendera Kugan?

*DW5:*

Tidak.

*PEGUAM PLAINTIF (LK):*

Setiap pegawai yang kamu tanya soal siasat menjawab tidak?

*DW5:*

Saya tidak ada tanya secara spesifik perkataan dera di situ, saya bertanya adakah kamu ada pukul atau tidak.

*PEGUAM PLAINTIF (LK):*

Dan kamu tanya setiap pegawai yang disoal siasat termasuk Konstable Navin?

*DW5:*

Ya.

*PEGUAM PLAINTIF (LK):*

Dan apa jawapan?

*DW5:*

Tidak.

*PEGUAM PLAINTIF (LK):*

Kesemua?

*DW5:*

Ya.

*PEGUAM PLAINTIF (LK):*

Termasuk Konstable Navin?

*DW5:*

Ya.

*PEGUAM PLAINTIF (LK):*

Adakah mereka sedar ataupun kamu tanya bagaimanakah kecederaan tersebut timbul ke atas Kugan kalau sebenarnya bukan mereka yang lakukan. Adakah kamu tanya soalan tersebut?

*Mahkamah:*

Mereka katakan bahawa mereka nampak Navin pukul.

*PEGUAM PLAINTIF (LK):*

Saya balik kepada D1, dan merujuk kepada catatan harian yang dimasukan oleh pegawai-pegawai yang bertanggungjawab dari hari ke hari. Secara rambang saya melihat pada tarikh 16hb Januari di m/s 22 terus ke m/s 23 dan ms 24. Cuba lihat catatan yang bernombor siri. 232. Nampak tak?

*DW5:*

Nampak.

*PEGUAM PLAINTIF (LK):*

Kalau maksud yang telah dicatatkan, bagaimana pulak terdapat pertuduhan bahawa ada cedera parah terhadap Kugan? Apakah persoalan yang dibuat kepada pegawai-pegawai yang telah memasukkan catatan bahawa Kugan berada dalam keadaan baik sedangkan terdapat seorang constable yang telah cederakan secara parah. Boleh terangkan kepada Mahkamah? Apa yang telah didapati daripada hasil siasatan?

*DW5:*

Siasatan didapati bahawa Kugan telah mendapat kecederaan akibat dipukul oleh Konstable Navindran.

*PEGUAM PLAINTIF (LK):*

*Adakah kamu setuju catatan yang dimaksudkan bahawa kugan berada dalam keadaan baik adalah satu catatan yang palsu?* (Emphasis added.)

*DW5:*

Tidak. (emphasis by this court)

*PEGUAM PLAINTIF (LK):*

Kamu telah membuat siasatan bahawa pada 16hb Januari 2009 pada pukul 7pg dan 4ptg, Konstable Navin telah melakukan cedera parah terhadap Kugan. Itu siasatan kamu?

*DW5:*

Ya.

*PEGUAM PLAINTIF (LK):*

Tetapi hasil siasatannya, tetapi pada tarikh 16,17 dan seterusnya terdapat catatan daripada pegawai-pegawai soal siasat D9 bahawa Kugan berada dalam keadaan baik. Persoalan saya, bagaimanakah terdapat catatan keadaan baik sedangkan beliau telah dicedera parah? Adakah catatan tersebut satu catatan yang palsu?

*DW5:*

Saya tidak tentu dalam catatan saya atau catatan itu adalah catatan palsu ataupun tidak.

*PEGUAM PLAINTIF (LK):*

Saya cadangkan kepada kamu catatan tersebut adalah satu catatan yang tidak menunjukkan keadaan yang sebenar terhadap Kugan. Setuju atau tidak?

*DW5:*

Tak setuju.

*PEGUAM PLAINTIF (LK):*

Saya balik kepada siasatan klasifikasi 302, setelah kamu mendapat alasan untuk menyiasat di bawah s 302, kamu teruskan dengan siasatan tersebut dan hasil daripada siasatan tersebut boleh kamu beritahu apakah cadangan yang diberikan kepada pihak Peguam Negara?

*DW5:*

Cadangan yang diberikan adalah tidak ada keterangan bagi menunjukkan bahawa terdapat unsur-unsur s 302 dalam siasatan saya dan saya dicadangkan di bawah s 331 Kanun Keseksaan.

*PEGUAM PLAINTIF (LK):*

Saya merujuk kamu kepada m/s 20 - 21 Bundle C yang merujuk kepada senarai kecederaan yang diperolehi atas badan Kugan. Nampak?

*DW5:*

Nampak

*PEGUAM PLAINTIF (LK):*

Terdapat lebih kurang 45 kecederaan yang boleh dikatakan kecederaan luaran sahaja dan di m/s 22, terdapat senarai kecederaan dalaman. Hasil daripada dapatan laporan bedah siasat ini, adakah kamu masih mengatakan bahawa hanya terdapat kecederaan sahaja di bawah s 330 ataupun seharusnya terdapat siasatan di bawah s 302?

*DW5:*

Siasatan dilakukan dibawah s 302 Kanun Keseksaan tetapi dalam menjalankan siasatan tidak ada keterangan bagi menyatakan bahawa terdapat unsur-unsur s 302 dan pertuduhan dibuat bawah s s 331 Kanun Keseksaan.

*PEGUAM PLAINTIF (LK):*

Jadi berdasarkan perbezaan itu, apa yang telah dibuat oleh kamu sebagai pegawai penyiasat? Adakah kamu telah menunjukkan perbezaan tersebut kepada Jabatan Peguam Negara?

*DW5:*

Ada dinyatakan.

*PEGUAM PLAINTIF (LK):*

Apa yang kamu nyatakan?

*DW5:*

*Tentang adanya dua laporan bedah siasat dan saya menggunakan laporan bedah siasat yang pertama yang mana telah dipohon oleh pihak polis untuk menjalankan bedah siasat ke atas Kugan dalam menjalankan siasatan.* (emphasis by this court)

*PEGUAM PLAINTIF (LK):*

*Boleh kamu ulang balik, kamu kata kamu menggunakan laporan siastan pertama. Kenapa kamu tidak merujuk kepada ataupun menggunakan laporan siasatan kedua?* (emphasis by this court)

*DW5:*

*Laporan bedah siasatan pertama adalah laporan yang telah dipohon oleh pihak polis untuk jalankan bedah siasat atas Kugan.* (emphasis by this court)

*PEGUAM PLAINTIF (LK):*

*Soalan saya kenapa kamu tak menggunakan laporan bedah siasat yang kedua?* (emphasis by this court)

*DW5:*

*Kerana bukannya satu bedah siasat yang dipohon oleh pihak polis ke atas Kugan.* (emphasis by this court)

*PEGUAM PLAINTIF (LK):*

Itu alasan kamu?

*DW5:*

Ya.

*PEGUAM PLAINTIF (LK):*

*Kamu tidak menggunakan laporan kedua kerana ia tidak diminta oleh polis?* (emphasis by this court)

*DW5:*

*Ya.* (emphasis by this court)

*PEGUAM PLAINTIF (LK):*

Siapa yang memberitahu kamu agar tidak merujuk kepada laporan kedua?

*DW5:*

Tidak ada siapa.

*PEGUAM PLAINTIF (LK):*

Saya mencadangan kepada kamu bahawa kamu telah gagal untuk melakukan siasatan secara professional dengan tidak mengambil kira laporan-Iaporan penting termasuk laporan kedua yang menunujukkan bahawa Kugan sebenarnya dimati akibat pukul dan didera. Setuju atau tidak?

*DW5:*

Tidak

*PEGUAM PLAINTIF (LK):*

Seterusnya saya mencadangkan kepada kamu, kamu sebenarnya telah dilantik untuk memastikan tiada pihak polis ataupun pegawai, mana-mana pegawai akan dipertanggungjawabkan atas pembunuhan Kugan. Setuju atau tidak?

*DW5:*

Tidak.

*PEGUAM PLAINTIF (LK):*

Saya juga cadangkan kepada kamu, walaupun kamu telah diarahkan untuk melakukan siasatan di bawah s 302, untuk pembunuhan Kugan kamu telah ingkar dan terus menggunakan s 330 untuk menutupi kebenaran yang telah dilakukan?

*DW5:*

Tidak.

*PEGUAM PLAINTIF (LK):*

Saya juga cadangkan kepada kamu sebenarnya daripada hasil siasatan kamu tahu bahawa dari mula Kugan ditangkap sehingga akhir hayat beliau pada 20hb Kugan sebenarnya telah dipukul, didera ketika disoal siasat yang menyebabkan beliau mati. Setuju atau tidak?

*DW5:*

Tidak.

*PEGUAM PLAINTIF (LK):*

Saya juga mencadangkan kepada kamu, rekod harian yang kononnya kamu merujuk adalah mengandungi catatan-catatan palsu bagi tujuan menutupi perkara yang sebenarnya berlaku terhadap kematian Kugan. Setuju atau tidak?

*DW5:*

Tidak

*PEGUAM DEFENDAN KEDUA (RS):*

Dengan izin Yang Arif. DSP Marzuki ya, DSP Marzukhi merupakan pegawai siasatan dalam kes ini ya? Jadi soalan saya mengikut siasatan yang dilakukan oleh DSP Marzuki adakah terdapat apa-apa bukti yang menunjukkan bahawa Defendan Kedua, iaitu Navindran telah menyebabkan kematian Kugan?

*DW5:*

Tidak

PEMERIKSAAN SEMULA

*PEGUAM KANAN PERSEKUTUAN:*

Dengan izin Yang Arif, pada perbicaraan lalu ketika ditanya oleh peguam Plaintif bahawa kita telah ditanya sama ada kita telah membuat perbandingan ke atas 'post mortem' pertama dan kedua dan kita jawab kita telah membuat perbandingan. Boleh jelaskan kepada Mahkamah apakah perbandingan yang kita telah buat?

*DW5:*

Perbandingan yang telah dibuat berkaitan post mortem pertama dan kedua adalah saya telah merujuk kedua-dua laporan yang diterima daripada kedua-dua hospital kepada pihak Jabatan Peguam Negara dengan keputusan keputusan yang ada di dalam laporan tersebut

*DW5:*

Perbezaan daripada … sebab kematian.

*Mahkamah:*

Slowly. Yes.

*DW5:*

Perbezaan tentang penulisan berkaitan kecederaan yang ada pada badan si mati.

*Mahkamah:*

Yes.

*PEGUAM KANAN PERSEKUTUAN:*

Dan ketika soalan juga ditanya pada kamu dicadangkan ya bahawa kamu hanya mengambilkira …

*Mahkamah:*

Better make sure dicadangkan oleh mana sebab ada dua..

*PEGUAM KANAN PERSEKUTUAN:*

Dicadangkan oleh peguam Plaintif bahawa kamu telah tidak mengambilkira post mortem yang kedua di dalam membuat siasatan kamu. Boleh jelaskan kepada Mahkamah kenapa kamu tidak bersetuju pada jawapan tersebut.

*DW5:*

Sewaktu saya menjalankan siasatan, saya telah menggunakan keputusan kedua-dua laporan post mortem sebagai rujukan di dalam penyiasatan. Kedua-duanya telah saya nyatakan dalam cadangan sewaktu merujuk kertas siasatan tersebut.

*Mahkamah:*

Ok

*PEGUAM KANAN PERSEKUTUAN:*

Dan kepada satu soalan juga yang dicadangkan peguam Plaintif bahawa sebenarnya yang kamu tahu yang Kugan ini telah dipukul dan didera sehingga meninggal dan jawapan kamu 'tidak dalam pengetahuan kamu'. Boleh kamu jelaskan kenapa tidak dalam pengetahuan kamu?

*DW5:*

Di dalam siasatan yang dijalankan, terdapat kesan kecederaan kepada Kugan akibat dipukul dan didera tetapi tidak menyatakan bahawa kecederaan… di dalam siasatan itu tidak dinyatakan bahawa kecederaan dan pukulan-pukulan yang ada, yang kena pada Kugan menyebabkan kematiannya.

*Mahkamah:*

Tidak terdapat?

*DW5:*

Keterangan.

*Mahkamah:*

Sebab kematian adalah diatas pukulan dan kecederaan yang dialami?

*DW5:*

Yes.

*Mahkamah:*

Mahkamah ada satu soalan. Apabila DSP Mohd Marzuki mengatakan tidak ada keterangan untuk mengatakan kematian adalah disebabkan pukulan dan diatas kecederaan, sama ada ini jawapan tidak terdapat dalam laporan post mortem? Dua-dua post mortem. You said you look at both post mortem, tidak ada atau ada?

*DW5:*

Laporan post mortem menyatakan bahawa terdapat kesan kecederaan.

*Mahkamah:*

Laporan post mortem yang mana satu?

*DW5:*

Kedua-dua laporan post mortem.

*Mahkamah:*

Dua-dua hanya… sebab kematian apa dia kata?

*DW5:*

Sebab kematian bagi post mortem yang pertama menyatakan bahawa 'pulmonary edema' ataupun paru-paru berair. Yang kedua menyatakan bahawa kidney failure due to blunt trauma due to … kalau saya diizinkan saya ingin merujuk semula …

*Mahkamah:*

I think the witness should rujuk kepada dua-dua laporan tersebut.

*PEGUAM KANAN PERSEKUTUAN:*

Dengan izin Yang Arif.

*Mahkamah:*

Which bundle are you referring Tuan SFC?

*PEGUAM KANAN PERSEKUTUAN:*

Ikatan C

*DW5:*

Post mortem yang pertama sebab kematian adalah 'pulmonary oedema'. Post mortem yang kedua sebab kematian adalah acute renal failure due to 'rhabdomyolysis' due to blunt trauma to skeletal muscles

**[46]** Based on the totality of the evidence, it is inconceivable and incredible the other officers involved in the investigation and interrogation which includes Sub Inspector Loh Voon Chye ('DW3'), ASP Radhuan and ASP Rodney Pasla Haris ('DW4') could have remained in total ignorance as to what had happened to the deceased during the period of his detention at the Taipan Police Station and the entries made in the station diary and despite the continuous intensive interrogation for 24 hours as instructed by ASP Radhuan by a team of interrogators who changed every 4 hours until the deceased had died on 20 January 2009. (Lockup Rules 1953).

**[47]** Police lockups and police station must be a safe place for every human being and should not be converted into a crime scene. If a police officer forfeits the confidence of the public as an institution to protect the safety and life of every person, law and order, it may not be able to regain their respect and esteem until and unless their approach in conducting investigation and interrogation has changed in accordance with modern times and public awareness of police function. The observation of this court has become necessary to impress upon police officers and the police force in general of the urgency of stamping out the brutal methodology from the investigative armory of the police. (*Ragbir Singh v State of Haryana* AIR 1980 SC 1087). The duty of police officers including the officer in charge of the Taipan Police Station who are entrusted with the custody, life and health of the deceased ought to have taken reasonable care for his safety while he remained in their custody and surely not to intentionally and deliberately inflict injuries on the person who was taken into police custody under the pretext of investigation and interrogation. A Police officer's function is to investigate persons suspected of crime or alleged to be criminals and not to turn themselves to be in the position of criminals or to turn the police lockup or police station as a crime scene as if that is permitted to happen, it will no doubt destroy the reputation of other innocent officers. In the present case, a proper surveillance and supervision by the officers of the Taipan Police Station would have prevented D2 and any other officers responsible from inflicting the brutal injuries on the deceased for which D1 and D3 should be held liable. (*Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84).

**[48]** It cannot be gainsaid that the nature of the tortious act in the present case will cast a serious aspersion on the police force affecting the integrity and professionalism. On the other hand, it must be made clear that this tortious act by the police officers at the Taipan Police Station does not and should not necessarily cast aspersion on the entire police force as that is not fair and just to cast aspersion and invent a negative perception on the entire police force. It is important to reiterate that one isolated incident should not be made to reflect negatively on the entire police force as there are also many dedicated officers who have contributed and conducted investigations professionally and rise up

A the expectation of the public, (*Tan Sri (sekarang Tun) Mohd Haniff Omar Kepolisian dan Keselamatan by TPP Mohd Reduan Aslie*). In so far as this court is concerned, the findings and decision of this court is based and confined to the factual matrix of the present case and in reference to the officers named in this suit including the witnesses who had testified on the defendants' behalf
B notwithstanding that there are possibly other officers who should have been called to testify to disclose the truth in this trial but were not called to testify and no disciplinary action taken against them.

C **[49]** In custodial deaths, evidence of proof are not easy to come in at the trial as there seems to be an emergence, common pattern for officers and colleagues who are responsible for custodial death or brutal attack on detainees to quickly deny the allegations of torture and suppress the actual cause of death which makes it difficult for claimants and family members to establish their case as to
D what had happened at the lockup or at the police station during the time the detainee is under the police custody. Therefore, *'public interest litigation, as in the present case, which is part of the process of participate justice and standing in civil litigation of that pattern must have liberal reception at the judicial doorsteps'*. (*Fertilizer Corporation Kamgar Union v Union of India* AIR 1981 SC 344 at
E p 355, *P-V Kapoor and Anor v Union of India and Anor* (1992) Cri LJ 128 at p 134 (Dal). This is also another case which concerns a matter of legitimate public interest and grave concern to society, especially, and in view of accusations thrown at police officers whenever there is a death in police lockup or stations. Custodial death is serious crime violence. Therefore, as soon as such
F incident is reported or has become public knowledge, the higher authorities in the police force, in the present case, D1 should act promptly, be transparent and must ensure that the investigation is conducted with promptitude by an independent investigation agency or the least to ensure that an inquest is held to determine the cause of death of the detainee who had died in police custody.

G

**[50]** On the other hand, this court finds that the evidence given on the defendants' behalf, indicating the circumstances leading to the death of the deceased is not truthful, an exaggeration and unreliable and is a case of not disclosing the true events of what had occurred during the time of the
H deceased's detention at Taipan Police Station from 15 January 2009 till his death on 20 January 2009. On the factual matrix and the surrounding circumstances of the present case and having observed the demeanor of DW1, DW3, DW4 and DW6 and based on the totality of the evidence, be it direct or circumstantial, there is compelling reason to find that the version given on
I behalf of D1, D3, D4 and D5 is most unreliable and not probable under the circumstances. On the totality of the evidence, this court finds there is sufficient evidence, be it direct or circumstantial to find that the plaintiff has established her claim on the balance of probabilities against the defendants, for which D4 and D5 must be vicariously liable. As for D3, it is unfortunate that

he has passed away on 8 October 2011 and was not able to testify as to his role and the purpose of calling the officers of Taipan Police Station for a meeting at the Contingent Police Head Quarters, Shah Alam when in fact his office was at all material time at Subang Jaya Police Station and not at the police Contingent Head Quarters at Shah Alam where D1 was positioned.

**[51]** This court would think it is a lesser evil to allow a suspect who is accused of a crime and is guilty in the eyes of police officers to be freed due to lack of admissible evidence to support the crime than to have a confession extorted or forced out through unlawful means or by brutal acts resulting in custodial death, as in the present case, which is a greater evil committed by a group of policemen from an institution who is expected to be in charge of law and order and national security. Such unlawful acts resulting in death in police locks up or stations will defeat the rights and liberty of a person guaranteed under the Federal Constitution and destroy them altogether which is unacceptable in a civilised society. This kind of unlawful act by officers of the same institution who are in charge of the law and order and national security will no doubt result in the confidence eroding and may if not attended to on an urgent basis diminish the trust and confidence in the institution which I personally have respect as there are many good and professional police officers who carry out their duties professionally and within the powers entrusted to them by law and this includes some past national, state and district police chiefs and investigating officers. However, it is most unfortunate to find that what had happened in the present case, is that, the violators of the crime who had caused the death of the deceased are those, who had been entrusted by law with the duty to protect this rights. This case demonstrates an instance of clear contravention or art 5 of the Federal Constitution as the right to live must include the right to live with human dignity. This court has to protect fundamental rights of every citizen to live and the right to life is a natural right embodied in art 5 of the Federal Constitution.

Article 5 of the Federal Constitution provides:

*5 Liberty of the person.*

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

In *Lai Kim Hon & Ors v PP* [1981] 1 MLJ 84, Tun Suffian, Lord President of the Federal Court said at p 92:

… Malaysia should not be allowed to develop into a police state …

Members of the Force who do their duty in accordance with the law will receive our and public support and encouragement; but those who treat suspects in a cruel manner can expect to receive only very severe punishment from the courts.

A

Parliament and the public will not allow a Savak to be established here, bringing disrepute to those responsible for the government and for the administration of justice.

B

**[52]** Be that as it may, enlarging the phrase that D2 had acted on a 'frolic of its own' when he committed the acts on 16 January 2009 would be too far fetched. Further if that contention is accepted, it could arguably mean that D2 had carried out the interrogation in his private capacity at the Taipan Police Station which had about 15 officers including Sub Inspector Loh Voon Chye

C

who was in charge of preparing the duty roaster. Further, if that contention that D2 had acted on a frolic of its own' and that his entry to the third floor and access to the deceased on the date and time being 16 January 2009 was unlawful, it would be an alarming and dangerous state of affairs as the police station should be the safest place for members of public to be present including

D

detainees and should be free of crime. Therefore, the contention on behalf of D1, D3, D4 and D5 that the act of D2 was a 'frolic of its own' is untenable and a desperate attempt to escape liability. By some mysterious dispensation, the truth seems to have been hidden from this court, but however, this court is not persuaded on the factual matrix of the present case to absolve D1 and the other

E

defendants from any civil liability. This court is satisfied that the police authorities at the Taipan Police Station were indeed in breach of their public duty in not having provided and protected the life and safety of the deceased who was detained pursuant to a remand warrant granted by the magistrate and who was in the custody of the police, between 15 January 2009 and 20 January

F

2009 until his death, even if the deceased is a suspected criminal. (Lockup Rules 1953).

Abraham Lincoln, said:

G

if you once forfeit the confidence of your fellow citizens (which must necessarily include police officers) you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time (*Ragbir Singh v State of Haryana* AIR 1980 1087).

H

**[53]** In the circumstances, this court finds that this is a case of lack of responsibility, professionalism, breach of public duty and gross violation of the constitutional rights accorded to any individual or detainee, in the present, the deceased, which must not be violated as public interest demand their safety

I

while in police custody. (*Osman v United Kingdom* (1998) 29 EHRR 245). The tortious act of the defendants had been 'deliberate, conscious and unjustifiable' and is an actionable infringement of the deceased's constitutional rights which has been committed by officers of the institution which was legally obliged to protect the rights of the deceased.

**[54]** Vicarious liability means that a person, free from blame, may be held liable for the torts of another. The principle is exceptional in the law of tort, with its historical emphasis on a philosophy of individualism, personal freedom and personal responsibility for the consequences of one's conduct and is thus confined to a few specific relationships. Most notable of these is the employer/employee relationship. In this context, the imposition of vicarious liability is acknowledged as performing important social and economic functions, equally from the perspective of distributive and corrective justice. An employer is vicariously liable only for those employee torts committed in the course of employment. The generally accepted formulation defining the course of employment, attributed to Professor John Salmond in the (1st Ed) of his book, the *'Law of Torts'*, has stood firmly and weathered almost a century of judicial scrutiny. The accepted formulation is surprisingly and perhaps unfortunately concise. An employer has been held to be vicariously liable for the intentional wrongdoing of his employee in wide varieties circumstances. The circumstances in which an employer may be vicariously liable for his employees intentional misconduct is not closed.

> An employer will be liable not only for a wrongful act of an employee that he has authorized, but also for a wrongful and unauthorized mode of doing some act authorized by the master.

**[55]** Despite, or perhaps because of, the simplicity of the Salmond formulation, in application it has proved to be somewhat less than precise, dependent on judicial attitudes in changing times. As such, it is, in application at least, an evolving concept that must be kept in check, to ensure that it continues to meet the needs of those changing times. This is particularly so given the range of different employment situations that exist in a modern, sophisticated economy, not to say the nature of different forms of wrongful conduct in which employees are capable of engaging. The 'one size fits all' approach is unlikely to achieve just results in all of the circumstances that can potentially give rise to claims for vicarious liability. It is also necessary to consider whether an action for vicarious liability (which means employer will be liable for employees' negligent act) could be established in regard to the breach of a duty of care. In order to hold an employer vicariously liable for the tort committed by the employee, the plaintiff must establish three elements:

(a) that the employee (tortfessor) is under the employment of the defendant;

(b) that the employee had committed a tort; and

(c) the employee had committed the tort during the course of employment.

**[56]** There can be little doubt that the introduction of the concept of vicarious liability into the law of tort was largely driven by the pragmatic consideration of finding a 'deep pocket' to ensure that compensation is paid.

Since, the employer takes the benefit from the enterprise in which the employee was engaged when the tort was committed; it is only fair that the employer be made liable (in addition to the employee). After all the employer has introduced the risk of the incident through his enterprise and perhaps, more to the point, the employer is in the best position to exert influence over employees and modify techniques of performance of public duty such that the occurrence of similar incident can be better avoided in future. In other words, the employer is in the best position to respond to the deterrence function of an award of damages. The decisive feature in the present case was that, in obtaining the confession from the deceased, D2 had used an improper method or means of obtaining the confessions for his superior which was for D1, D3 and D4. There is closeness of the connection between the duties which D2 was instructed to perform and which resulted in the death. D4 and D5 are vicariously liable. D2 was not engaged 'on frolic of his own' or not acting as an employee or had departed from the course of his duty. Vicarious liability of the employer for the tortious act of his employee or servant which liability is derived from the doctrine 'respondent superior' 'qui facit per alium facit per se'. Basically, it means 'he, who employs another to do something, does it himself' or 'he would does an act through another is deemed in law to do it himself', so long it is done 'within the course of employment'. By exercise of reasonable care, proper steps taken to supervise, monitor and obtaining report or the outcome on a regular basis of the progress of the intensive interrogation of the deceased, would have avoided the fatal harm caused to the deceased for which the defendant must be found liable. (*Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 (QB), Lockup Rules 1953). Accordingly, there was breach of duty for which the defendants must be found liable.

**[57]** It is a question of fact in each case whether the tortious act committed by the servant or employee relates to the sphere of the employment or to the mode or method of performance. The court must look at the circumstances broadly without dissecting the employees' duty or task into component activities. (*Ilkiw v Samuels* [1963] 1 WLR 991 at p 998). It is the cummulative effect of the conduct which is important and has to be taken into consideration rather than individual incidents. Mere prohibition of the mode of performing his job while in the employment cannot be used as a defence in the award of exemplary damages as the court must take into account not only the interests of the deceased and his family and the defendants but also the interests of the public as a whole with the view to ensuring that the public bodies or officials do not act unlawfully and abuse their powers but to carry out their public duties properly and lawfully, ( s 20 of the Police Act 1967, *Nilabaty Beraha v States of Orissa* (1995) 2 East Cri C 281 (SC)). In this respect, this court must play an important and vital role in not only preventing and remedying the abuse and misuse of powers but also to eliminate any exploitation and prevent injustice. (*Janata Dal v HS Chowdhary & Ors* AIR 1993 SC 892; AIR 1996 Cal 181 at p 219).

**[58]** In the present case, scope of the duty of D2 to obtain or extort information or confession from the deceased was to facilitate the investigation for his superior officers, in the present case, the investigating officer and it was within the scope of his employment. If in the course of his employment and duty and during the intensive interrogation, D2 had acted in excess of what was necessary in carrying out his duty, and in the course had inflicted the injuries to the deceased which had resulted in the death, it does not necessarily mean the act is outside the class of authorised acts. Upon considering the extent of the instruction given to D2, be it authorised, express or implied and although the acts committed by D2 were unlawful and wrongful, it is clear that the performance of his duty was done in the course of his employment. The extortion of the confession from the deceased by D2 was in any event for the benefit of his superior officers, the investigating officers and the other defendants. On the other hand, even if his performance was done in a high handed fashion and was unlawful or wrongful, the fact remains that the end result of the extortion of the confession which was done in the course of his employment was for the benefit of his superior officers and the defendants. In the circumstances, when the evidence is considered cummulatively, this court is satisfied that the acts committed by D2 were done in the course of his employment and that D1, D3, D4 and D5 are not permitted to conveniently and unfairly disclaim liability by merely saying that the acts of D2 were committed outside the scope of his employment or that the act of D2 was committed on a 'frolic of his own' which is untenable. The acts of D2 was done in the course of his employment with D4 and D5 and that the duty D2 had performed was for his superior officers and for the defendants for which D2 is found liable and accordingly, D4 and D5 are vicariously liable for the act or acts of D2. (*Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62 at p 67, *Lloyd v Grace, Smith & Co* [1912] AC 716, *Goh Choon Seng v Lee Kim Soo* [1925] AC 550, *Keppel Bus Company Ltd v Sa'ad bin Ahmad* [1974] 1 MLJ 191 (distinguishable on the factual matrix and circumstances of that case), *New South Wales v Lepore* (2003) 195 ALR 412, *Saheli, A Women's Resources v Commissioner of Police* AIR 1990 Dehli 513).

**[59]** In fact, attempts were also made to introduce evidence on behalf of D1, D3, D4 and D5 that D2 had entered the third floor of the Taipan Police Station where the deceased was detained on 16 January 2009 and that his entry to the third floor was not permitted at the time. However, it must made clear that the defendants cannot approbate and reprobate and if that evidence is accepted so as to place the entire blame on D2 and to absolve the other defendants from liability, it will be a sad day for the detainees held in police lockup or stations that their safety is compromised and it will reflect on lack of security system, supervision or management by the officers manning the police station and that it is not monitored by the officer in charge at the police lockup or station. It is important to make it clear at this stage that causing assault and battery or grievous hurt to the deceased is obviously not within the scope of D2's

employment but however, the acts committed were certainly done during the course of his employment and the extortion of the confession was for the benefit of his superior officers and the investigation team. While the acts committed by D2 was unlawful and wrongful or the extraction for the confession from the deceased was through wrong mode or method which D2 was expressly or impliedly authorised or employed to obtain from the deceased, it was still part of D2's duty to his master, in this case, D1, D3, D4 and D5 to ensure that the extraction of the confession from the deceased was carried out in the course of his employment. As stated above, and even if D2 had acted in a very high handed manner, the fact remains that he was acting in the course of his employment or in the course of his performance of his duties. However, and even if the interrogation or the information sought to be extracted was carried out by D2 in the manner which is unacceptable and the force used was excessive, it may arguably amount to merely acting in excess of what was necessary in carrying out his duty to obtain the confession which D2 was authorised to do, which in any event, it still does not absolve D1, D3, D4 and D5 from vicarious liability. (Scrutton LJ in *Polland v John Parr & Sons* [1927] 1 KB 236).

**[60]** There is also sufficient evidence that would justify the ascription of the act of D2 to the authority impliedly vested in D2 by his superior officers, inter alia, ASP Radhuan, ASP Rodney Pasla Haris (DW4), Inspector Faaezal bin Monir (DW2) and Detective Sub Inspector Loh Voon Chye (DW3). While D2 may not have been expressly authorised to conduct himself in the unlawful manner, but however, D2 had been placed in the position to carry out the interrogation and extract the confession for which D1 and D3 must be answerable for the manner in which D2 had conducted himself in carrying out his duties. Had there been proper and regular supervision and monitoring system in place, ASP Radhuan or Inspector Faaezal or Detective Sub Inspector Loh Voon Chye would have discovered the unlawful act or the grievous hurt much earlier or on 16 January 2009 that it is, in the event they have no knowledge of the deceased's condition prior to his death as which have been claimed which this court is unable to accept the plea of ignorance. Consequently, D4 and D5 must be found vicariously liable. (*Barwick v English Joint Stock Bank* (1866–67) LR 2 Ex 259). Accordingly, D1, D3, D4 and D5 must be prepared in the circumstances of the case to be answerable and responsible in law and on the factual matrix of the case for the acts committed by D2 and they are found vicariously liable for the tortious act of D2.

**[61]** Be that as it may, this court finds that the cummulative effect of the entire evidence produced on behalf of D1, D3, D4 and D5 is inconsistent, contradictory, unreliable and is against the weight of the totality of the evidence which favours the plaintiff's case and the evidence on the defendants' behalf cannot succeed as rebuttal evidence. The fact remains that the deceased died as

a result of the injuries inflicted on him while he was in the police custody. The extent of injuries found on the deceased as stated in the first port mortem report dated 24 February 2009 (exh P7) and both the internal and external injuries has found in the second post mortem report dated 25 January 2009 (exh P5) of DR Prashant N Samberkar, the Pathologist from University Malaya Medical Centre was in all probability inflicted when the deceased was in the custody of the police officers at the Taipan Police Station between 15 January 2009 and until his death on 20 January 2009 and the grievous injuries cannot possibly be confined to the incident on 16 January 2009. In so far as D1, D3, D4 and D5, they have failed in their public duty to protect the fundamental and constitutional rights of the deceased while in the custody of the police as at 14 January 2009 and at Taipan Police Station between 15 January 2009 till 20 January 2009. Is this not a case of the deceased having been taken into police custody alive on 14 January 2009 but regrettably, the plaintiff was handed a dead body of the deceased by the police with external and internal injuries as found in the post mortem report for which D4 and D5 cannot disclaim liability and attempt to relinquish their responsibility by looking for exits. In the present case, this court finds there is no denial that the first time the family of the deceased was informed of the deceased's whereabouts was after his death on 20 January 2009 at 9am although he was in police custody from 14 January 2009 till his death on 20 January 2009. There has been no explanation or reasons given for not informing the deceased's family that the deceased was in police custody from 14 January 2009. Therefore, D4 and D5 cannot escape liability and must be prepared to accept their responsibility for which they are found vicariously liable.

**[62]** It is not disputed that the fatal injury which the deceased had sustained arose out of and in the course of D2's employment with D4 and D5. The submission of learned senior federal counsel, with respect appears to be inconsistent, perhaps, in his desperate attempt to absolve D1, D3, D4 and D5 from vicarious liability. On one hand, it is submitted by learned senior federal counsel in his written submissions dated 18 March 2013 and his oral submissions on 29 May 2013 that the tortious act committed by D2 on 16 January 2009 was a 'frolic of his own' and D4 and D5 cannot be found vicariously liable for the tortious act of D2. On the other hand, learned senior federal counsel when pressed by this court, during further clarification on 14 June 2013 in respect of the new set of authorities submitted to the court by him on 31 May 2013 and on 7 June 2013 by the plaintiffs solicitors, learned senior federal counsel has submitted that D4 and D5, if at all could only be found vicariously liable for the tortious act committed by D2 on 16 January 2009 as per the particulars of the offence included in the charge in respect of the criminal case. Learned senior federal counsel has contended on 14 June 2013 that D4 and D5 cannot be found vicariously liable for the other tortious acts if the court so finds to have been committed on other instances during the period of the deceased s detention or subsequent to 16 January 2009. However,

on the factual matrix in this case, this court finds that D4 and D5 are vicariously liable for the tortious act or neglect of D2. Custodial death during investigation and interrogation by the police officers while the detainee is in their custody, be it in the lockup or police station will certainly give rise to liability in damages. Consequently, in the present case, D4 and D5 are vicariously liable for the tortious act of D2 or the officers responsible for the interrogation and stationed in the Taipan Police Station or part of the team of the officers involved in the intensive interrogation during the period of the deceased's detention.

**[63]** In the circumstances, this court is unable to accept the arguments advanced on behalf of D1, D3, D4 and D5 that they are not liable. As stated above and based on the grievous nature of the injuries inflicted and found on the deceased the defendants' case itself is contradictory, inconsistent and unreliable that the deceased was assaulted only on 16 January 2009 but must have occurred on other dates and by the other officers or policemen as well during the period the deceased was in their custody. It is their duty, at the least, the officer in charge of the Taipan Police Station to take all the necessary precautions for the care and safety of the deceased when he was in police custody. Therefore, if damages are awarded by this court in respect of the plaintiff's claim it must be recoverable and enforceable against D4 and D5. The D3, D4 and D5 or D3 cannot shift the legal responsibility of the unlawful tortious act onto the shoulders of another person, in the present case, D2 alone and plead to this court not to impose liability against D1, D3, D4 and D5. Based on the evidence and the circumstances of this case, it would not be in the public interest for D4 and D5 to be permitted to disclaim liability for the death of the deceased when he was in the custody of the police officers at the Taipan Police Station between 15 January 2009 until his death on 20 January 2009 as it would be grossly unfair, unjust and would lead to a travesty of justice to deny the plaintiff's claim and absolve D4 and D5 from vicarious liable. There is no evidence to support that D2 had used his position or had carried out the extraction of confession from the deceased for his private advantage. This court is of the considered view, with respect, that this is a case of learned senior federal counsel trying his every best as desperate attempt not so much to assist the court on the evidence and for the court to arrive at a just decision but to persuade this court not to find D1, D4 and D5 liable to the plaintiffs claim. However, this court is not prepared to yield to his persuasion to find for the defendants as that will be contrary to the totality of the evidence which supports the plaintiffs case. (*Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653).

In *Roshairee bin Abd Wahab v Mejar Mustafa bin Omar & Ors* [1997] 3 MLJ 337; [1997] 1 CLJ Supp 39, the court said:

The facts in that case as reported is as follows: A

(a) By this claim, the plaintiff sought damages in relation to 2 alleged incidents of assault, supposedly committed on him by the first and second defendants. The plaintiff also claimed for damages against the third respondent, ie the government, by way of vicarious liability for the actions of the first and second defendants. B

(b) The plaintiff's case was that he was ragged and assaulted by the first two defendants while undergoing an orientation programme shortly after reporting for duty with the Royal Malay Regiment. The second incident alleged was that while the plaintiff was on the floor doing some push ups, the first defendant kicked and punched his right ear. The plaintiff then attempted to escape by running but the first defendant pursued him. C

James Foong J (Later FCJ said:

But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes — although improper modes — of doing them. *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 at p 599, which adopted a passage from Salmond on Torts. In turn, it is accepted by our Malaysian Courts in *Keppel Bus Co Ltd v Saad bin Ahmad* [1972] 2 MLJ 121 which was affirmed by the Privy Council in [1974] 1 MLJ 191. D E

In other words, a master is responsible not merely for what he authorises his servants to do, but also for the way in which he does it. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible for in such a case the servant is not acting in the course of his employment, but has gone outside of it. F

By this provision, the third defendant's claim that the practice of such activities is and was unauthorised and will not be tolerated.

Though this may be so, this Court has still to decide based on the entire evidence whether the acts of the first and second defendants were carried out while they were in the course of their duties, to the extent that they were so connected with their authorised duties that they may be regarded as a mode of doing them. G

Though the first defendant's acts of assault were unauthorised by the third defendant, they were carried out during the normal course of duty of the first defendant. H

Such being the case, his unauthorised acts have become so connected with his authorised acts that this Court finds them to have become 'modes — although improper modes — of doing them'. For this, the third defendant must be held vicariously liable for the unlawful actions of this defendant. I

**[64]** The law would be grievously defective if D4 and D5 are allowed to maintain that they do not owe a duty of care for the safety of the deceased from

A the time he was taken to police custody on 14 January 2009 and throughout the period of his detention at the Taipan Police Station from 15 January 2009 until his death on 20 January 2009. Such an argument on the factual matrix and the surrounding circumstances, with respect, would be without proper basis and would be extremely far fetched and this court, with respect, has no
B hesitation whatsoever to reject the proposition put forward by learned senior federal counsel to absolve the defendants. D1, D3, D4 and D5 cannot escape liability as they are under absolute duty to ensure the safety of the deceased while he was in police custody and cannot look for exit, especially when their function is to perform public duty and to ensure that police lockups and police
C stations are not converted or into crime scene by their own officers, ( s 20 of the Police Act, 1967 and Lockup Rules 1953).

**[65]** Having found the defendants liable for the tortious act committed
D against the deceased, it is important to reiterate that simply because the act or the statement given to the media by some officers has given rise to dissatisfaction or suspicion or lack of faith in the police force due to the tortious act of some individual officers, it should not place the entire police force in the bad light by making vague, reckless and irresponsible sweeping allegation
E against the entire police force or damage the faith of people who may still have faith and trust on many other officers and the police force in general. It is also important to state that the findings of this court on the tortious act is not against the entire police force but is limited or confined to the officers named in the suit and the officers who were in charge of the interrogation at Taipan
F Police Station during the time the deceased was in their police custody from 15 January 2009 until his death on 20 January 2009.

**[66]** Be that as it may, while learned senior federal counsel from the attorney general's chambers has a duty to defend, and perhaps, to protect the integrity of
G the police force and the defendants as in the present case, but he must be reminded that he also owes a duty to this court. The duty to this court is paramount and is an inescapable task to assist this court to arrive at a just decision. However, learned senior federal counsel, with respect, cannot and should not be allowed to protect the officers responsible for the custodial death
H or any crime committed by them, in the present case, the death of the deceased, or condone death in a police lockup or police station which is committed by the officers, upon obtaining a remand warrant, no matter what their rank is, especially when the evidence produced in the present case and considered in its totality is overwhelmingly supportive of the plaintiff's case. In the present case,
I it is unfortunate that this court has to make a finding against D1, who at the time of the deceased's death was the Chief Police Officer of the State Selangor, at the time of giving evidence in court, he was the Deputy Inspector General of Police and presently, at the time when this court is to deliver its decision he is the Inspector General of Police. In that respect and based on the factual matrix

of the case and for the reasons as stated above, it would have been a better option to concede to liability on the defendants' behalf and particularly, where D3, the OCPD of Subang Jaya, Police Station had died after the deceased's death and he is implicated where he had called for all the officers and the policemen of Taipan Police Station for a private meeting at the Contingent Police Head Quarters, Shah Alam and considering there is sufficient evidence of cover up as to the cause of the deceased's death. In addition, there is also evidence of D1's refusal to clarify his previous statements to the media and the protection given to other officers involved in the death of the deceased and the false entries made in the station diary as to the condition of the deceased.

**[67]** As stated above, in the present case, in so far as the plaintiff's claim against the defendants, it is a tortious claim for negligence, breach of public duty, assault and battery, misfeasance and false imprisonment during the period of the deceased's detention which has no relevance or admissible at the criminal trial against the particulars of the charges framed against D2. Consequently, and as the evidence produced in this suit is so overwhelming that justifies admission of liability for the reasons stated above. In addition, D1 had testified with no uncertain terms that the investigation against D2 under ss 330 and 331 of the Penal Code had nothing whatsoever to do with the cause of the deceased's death and that the charges were instituted because D2 had committed a criminal offence on 16 January 2009 and not because of the deceased's death. For easy reference, D1's evidence in this respect is reproduced:

*Peguam plaintif:*

Tadi Tan Sri kata siasatan tentang kes kematian Kugan ini diklasifikasikan sebagai s 330 Kanun Keseksaan?

*DW1:*

Bukan kes kematian Kugan, tetapi siasatan terhadap salah laku polis dalam kes Kugan ini.

**[68]** In the circumstances, this court wishes to reiterate that the fact of any concession on the defendants' behalf in this civil suit will have no bearing or relevance to the criminal charges against D2 as testified by D1 which is confined to the criminal offence committed on 16 January 2009 as witnessed by DW6 and not in respect of the tortious acts as pleaded against the defendants in the present suit. Therefore, the concession would have saved the officers of Taipan Police Station and D1 from being exposed to various other flaws and attack which has been revealed in this trial. In addition, 'Huge cost to public purse and substantial police time and resources being diverted to prepare for and proceed with this trial could have been saved resulting in a significant diversion of police man power and attention of their most important function being suppression of crime'.

**[69]** Be that as it may, it is not inappropriate to state at this stage, with respect, that times have gone where legal officers of the attorney general's chambers, who will stand up in court and graciously concede to some of the evidence or matters which has emerged during the trial whenever it is disclosed the investigation had shown flaws and was not carried out in accordance and in compliance with requirements of the law. As an officer of the court, learned senior federal counsel, with respect, is obliged and is expected to be candid and show utmost professionalism in carrying out his duty. His or her paramount duty is to assist the court with the truth and to introduce fairly and impartially all admissible evidence but surely, with respect, his duty is not to cloud the relevant issues in order 'to bolster a case for the defendants which was clearly defective' right from the beginning or to protect the defendants from the obvious flaws, irregularities, blunders and unethical practice and which is found to be contrary to law. What this court has observed and commented should be embraced in good faith and accepted only as a reminder to the legal officers that they should have no personal interest in the outcome of the litigation which learned senior federal counsel is aware but purely to ensure that a decision is given in accordance with the true spirit of justice and fair play.

**[70]** On his elevation ceremony as judge of Federal Court of Malaysia, Salleh Abas FJ (later Lord President) said:

> I am now required to perform my job in an atmosphere of calm and tranquility, free from inferences from any quarters. Every conceivable point must be given due consideration, and every aspect of law must be studied, or the decisions will be out of line with the law. Needless to say, therefore these onerous duties could not be performed without any the kind assistance and co-operation of both members of the Judicial and Legal Service and the Bar, and in particular, the advocates who will appear before me. When the excitement and novelty of the appointment subsides, I look forward to the pleasant relationship with the members of the legal profession, be they in the Government service or in the private sector, in common endeavors to dispense justice. (1979) 1 MLJ lxxxix-xc)

**[71]** In the present case, there are compelling reasons to find that the tortious act on the deceased was a continuing act till his death on 20 January 2009 and it is a reasonable inferences to be drawn based on the direct and circumstantial evidence. The cummulative effect of the facts and surrounding circumstances so established and relied on by the plaintiffs is reasonable and capable of such an inference.

In *Jones v Great Western Railway Company* [1930] AC 152 Lord McMilllan said at p 202:

> An inference in the legal sense is a deduction from the evidence and if it is a reasonable deduction, it may have the validity of proof.

In *Caswell v Powell Duffryn Associates Collieries Ltd* [1940] AC 152 at pp 186–170, Lord Reid said: A

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability but if there are no positive proved facts from which the inference can be made the method of inference fails and what is left is mere speculation or conjecture. B

In *Maharashtra State Board of Secondary & Higher Secondary Education v Gandhi & Ors* [1991] 2 SCC 716 at p 748, the Supreme Court said: C

> Inference from the evidence and circumstances must be carefully distinguished from conjecture or speculation. The mind is prone to take pleasure to adopt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. There must be evidence, direct or circumstantial, to deduce necessary inference in proof of the facts in issue. There can be no inference unless there are objective facts directs or circumstantial from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred as much as practical as if they had been actually observed. In other cases the inferences do not go beyond reasonable probability. If there are no positive true facts, oral, documentary or circumstantial from which the inference can be made, the inference fails and what is left is mere speculation or conjecture. D E

**[72]** Be that as it may, proof of facts need not necessarily be obtained from the plaintiff's case but on the totality of the evidence before the court and this would also include evidence of the defendants. In other words, evidence in support of the plaintiff's case need not necessarily be confined to what is adduced on the plaintiffs' behalf but the whole of the evidence from whatever source, either by the plaintiff's own evidence or by cross-examination of the defendants or by admission and any admission made by or on behalf of the defendants must also be taken into consideration, (see *Yew You & Anor v Mash Poay Loh & Anor* [1970] 1 MLJ 57 at p 59, *Neo Chan Eng v Koh Yong Yoe* [1960] MLJ 291 at p 292). F G

> …It is elementary law that the onus on the plaintiffs is satisfactorily discharged once it appears to the court on balance of probabilities that the circumstances are more consistent than not with the defendants' negligence. Evidence in support of the plaintiffs' case is not necessarily confined to what is adduced on their behalf, but the whole of the evidence, from whatever source, must also be taken into consideration. (*Yew You & Anor v Mah Poay Koh & Anor* [1970] 1 MLJ 57 at p 59, Ong Hock Thye CJ (Malaya)) H I

> Proof is required but proof of the fact depends upon the degree of probability of its having existed. On the other hand, proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would

induce a reasonable man to come to a particular conclusion as a fact, (see Fletcher Moalton LJ in *Hawkins v Powells Tillery Steam Coat Co Ltd* [1911] 1 KB 988).

For weighing evidence and drawing inferences from it, there can be no cannon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited (see *R v Madhub Chander* (1874) 21 WRC 13).

When it is said that a person who comes to the Court for relief must prove his case, it is never meant that he must prove it with absolute certainty. No fact can be proved in this world with absolute certainty. All that can be done is to adduce such evidence as that the mind of the tribunal is satisfied that the fact is so. This may be done either by direct evidence or by inference from facts. But the matter must not be left to rest in surmise, conjecture, or guess. (per Buckley LCJ, in *Hawkins v Powells Tillery Steam Coal Company Ltd* [1911] 1 KB 988 at p 996).

**[73]** In so far as ss 5 and 6 of the Government Proceeding Act 1956, the officers responsible for the custodial death of the deceased have been named and one of the officers named had committed the tortious act on 16 January 2009 as witnessed by DW6 Therefore, liability has been established against D2 to trigger the provisions of ss 5 and 6 of the 1956 Act.

Sections 5 and 6 of the Government Proceeding Act 1956 provides:

*5 Liability of the Government in tort.*

Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

*6 Limits of liability of the Government*

(2) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

(3) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under section 5 in respect of such act, neglect or default of such officer, apply in relation to the Government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.

(4) No proceedings shall lie against the Government by virtue of section 5 in

respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

(5) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.

(6) For the purposes of subsection (4) the expression 'appropriate financial officer' means, in respect of the Federal Government, the Minister of Finance, and in respect of the Government of a State, the State Financial Officer, and, in the case of the States of Sabah and Sarawak, the State Minister responsible for finance.

**[74]** Therefore, this court finds that the plaintiff has on the balance of probabilities established the claim against the defendants and the defendants are found liable to the plaintiff's claim.

**[75]** The object of awarding damages is *two fold*, whether for breach of contract or tortious act, it is to compensate the plaintiff or the family for the loss suffered as a result of the actions of the defendant. In some cases, the court has the discretion in law where the conduct is sufficiently proved to be so an outrageous conduct of some reprehensible kind, where the offender acts in contumelious disregard to the plaintiff's rights, justice demands and merits punishment for which an award is made which is recognised as *'exemplary damages'*. (*Mc Gregor on Damages 16th Edi at p 430, Sweet & Maxwell, Whitfield v De Lauret* (1920) 29 CLR at p 79). There is also a further category of damages which has been awarded and referred to as 'aggravated damages' and it has been awarded in certain circumstances and it has been awarded for tortious acts, to express the court's 'condemnation' and 'disapprobation' of the offender's conduct. (*Rookes v Barnard* [1964] AC 1129 at p 1221, *Wilkes v Wood Huckle v Money (1763) loft,* (1763) 2 Wills KB 205, *Benson v Frederick* (1766) 3 Burr 1845, *Drane v Evangelou* [1978] 1 WLR 455, *Asghar v Ahmed* (1984) 17 HLR 25, *Mc Millan v Singh* (1984) 17 HLR 120, *Millington v Duffy* (1984) 17 HLR 232). It is the gravity and the character and the outrage conduct of the defendants and the need for deterrence where tortious act was inflicted and calculated to inflict injury (*Harris v Digital Pulse Pty Ltd* (2003) 44 ALSR 370, *Thomson v Commissioner of Police for the Metropolice* [1999] 2 All ER 762, *XL Petroleum (NSW) Ptd Ltd v Cultex Oil (Australia) Pty Ltd* (1985) 155 CLR 1 at p 10, *Lamb v Contogno* (1987) 164 CLR 1 at pp 10–13, *Templeton & Anor v*

*Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202, *Templeton & Ors v Low Yut Holdings Sdn Bhd* [1993] 1 MLJ 443, *Cheng Hong Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352).

**[76]** As to the quantum proposed by learned counsel for the plaintiff, the plaintiff cannot expect this court to award damages as quantified, being, RM5m to play to the public gallery because the defendants also expect justice from this court as much as the plaintiff. In order to decide whether this court should award 'exemplary' or 'aggravated' damages, this court has to assess the conduct of the defendants, be it individually or collectively in the context of all the circumstances and the aggravating circumstances. In the present case, this court finds, first, the conduct of D2 and other police officers is shockingly harsh, oppressive, reprehensible and justice demands that the award for exemplary or aggravated damages will necessarily reflect in the courts disapproval and condemn, particularly when the conduct of D2 is so outrages and was in total disregard to the legal and unconstitutional rights of the deceased. In other words, the award of punitive damages in the law of tort and on the factual matrix and considering circumstances of the case and the position of the defendants, the award of punitive damages ought to be available when the conduct of the defendant was such as to merit condemnation, for the cover up, the manner in which the injuries were inflicted on the deceased.

> While considering the request for exemplary damages, this Court must bear in mind that the objective for an award under this category is to punish the defendants, and to display the Court's indignant attitude towards the acts committed by the defendants.
>
> However, from the enlightening judgment of Lord Devlin in *Rookes v Bernard* [1964] AC 1129, such damages must be restricted to situations where there are:
>
> 'oppressive, arbitrary or unconstitutional action by the servants of the Government' or where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.'
>
> It is the opinion of this Court that with what has transpired after the incident, and the award of substantial compensatory damages which includes aggravated damages which the defendants would have to pay, the 1st and 2nd defendants would be sufficiently punished for their irresponsible actions, without having to add on further with exemplary damages.
>
> It is also the aspiration of this Court that this award of significant damages would also deter others from continuing or reviving the practice of such unlawful acts. (*Roshairee bin Abd Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39, *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202).

**[77]** The award that is made for the loss of dependency and for pain and

suffering under ss 7 and 8 of the Civil Law Act 1956 does not constitute sufficient public disapproval unlike the exemplary damages to the particular form of the wrong doing namely, the brutal and 'monstrous conduct' on the part of D2. The unlawful act could not have been committed without the knowledge and tolerance of his superiors and other officers involved in the investigation so as to deter the defendants and other officers from such conduct in the future and to 'mark' the courts disapproval of D2's conduct in all the circumstances of the case. The conduct of D2 is an irresponsible behaviour as such that the level of conduct is outrages and flagrant disregard to the deceased's safety meriting condemnation and punishment by way of awarding *exemplary* damages. In fact, the award for exemplary damages has been awarded in other jurisdictions which has affirmed the judicial power to 'mark' high handed heinous conduct and in contumelious disregard of another rights through the award of punitive damages without limitation to *Rookes v Barnard* [1964] AC 1129 which is a narrow category in tort as part of common law. Punitive damages are also awarded against the defendants, inter alia, for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'. (*Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 at para 196).

> Exemplary damages are given in cases of conscious wrongdoing in contumelious disregard of another's rights (Knox CJ in *Whit Field v De Lauret & Co p Ltd* (1920) 29 CLR 71 at p 77).
>
> Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them if an odd prisoner dies in the lockup, because there would hardly be and evidence available to the prosecution to directly implicate them with the torture. The Courts, must not loose sight of the fact that death in police custody is perhaps on of the worst kind of crime in a a civilised society, governed by the rule of law and poses a serious thereat to an orderly civilised society.
>
> The Courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the case of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of crime has the satisfaction that ultimately the Majesty of Law has prevailed.
>
> Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of a an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purpose full to make the investigation effective. By torturing a person and using their degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

A How do we check the abuse of police power? Transparency of action and accountability perhaps are tow possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the Constitutional ethos. Efforts must be made to change the attitude and approach of the police personal handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable form of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree methods during interrogation. (*DK Basu and another v State of West Bengal and another* (1997) SCC (Cr) 92).

The injuries sustained by the deceased cannot be disputed because the deceased was inside the jail under the custody of wardens, respondent Nos 5 to 13 and the injuries were sustained inside the jail and, therefore, there is no dispute that the injuries sustained by the deceased were perpetrated by the respondent Nos 5 to 13. That the specific averments made in para 10 of the writ petition are not disputed by the respondents. Therefore, it is accepted as gospel truth that the injuries sustained by the deceased have been perpetrated by the respondent Nos 5 to 13 resulting in his death.

Of late a custodial death has become the rule of the day. It is heinous crime perpetrated by the custodians of law. If custodians of the law themselves indulged in committing such crimes then no part of the society is safe and secured. If the jail wardens whose duties are to provide security and protection to the citizens indulged in such methods instead of providing security and creating a sense of insecurity in the minds of the citizens then the citizens will have no confidence in the custodians of law. Such acts perpetrated by the custodians of law are more heinous than the game keeper becoming a poacher or a treasure guard becoming a robber.

If the above facts are established it is well substantiated that there has been flagrant infringement of indefeasible right guaranteed by Article 21 of the Constitution and in such a situation the citizen has a right to get exemplary damages.

Now what remains to be decided is the quantum of compensation. No amount of treasure on earth can be substituted for the dear and loving one. Any amount of compensation that may be awarded is only in the nature of exemplary damages and in palliative. The deceased was stated to be aged 24 years. If this is so, the petitioner has lost his son at the prime of his life. However, as already observed no amount of compensation can be adequate in terms of valuable and precious life. (*Ghotovi Sema vs State of Nagaland And Ors* 1996 ACJ 996).

**[78]** While exemplary damages is seen to be an exceptional remedy and reserved for the most reprehensible circumstances of civil wrongdoings and limited to three categories test as in *Rookes v Barnard* [1964] AC 1129 but later cases have opened up the categories for further evolution, where there are compelling authority including circumstances on the wrongdoing by police officers. (*Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All

ER 193, *Huckle v Money* (1763) 95 ER 768, *Wilkes v Wood* (1763) Lofft 1, 98 ER 489 (KB) at pp 498–499). In any event, Lord Devlin's first category as recognised in *Rookes v Barnard* [1964] AC 1129 fits the present case as justifying the award for exemplary damages and therefore is within the scope of the first category.

**[79]** As to the award for aggravated damages, it would act as a sufficient deterrence to the defendants, and other officers who seems to have the 'cultural habit' of being oppressive and inflicting physical assault on suspects and detainees and it would cause the officer in charge of arrest, interrogation and investigation and the superiors to take adequate steps necessary to ensure that such oppressive and unconstitutional misconduct offences will be unacceptable and objectionable against those who act irresponsibly or contrary to the public interest so as to send a reminder that they must treat suspects and detainees with the sense of decency and professionally and it is an uncompromising duty.

**[80]** In fact, eminent judges have considered and accepted from very early years that 'exemplary damages' is available in certain circumstances, in torts, and 'to be punitive for reprehensible conduct and as a deterrence' and have used the expression 'Vindictive damages', 'retributary damages' or 'punitive damages'. (*Merest v Harvey* 5 Taunt, 442 (in 1814), *Amiable Nancy 3 Wheat,* 546 at p 558 (in 1818), *Emblen v Myers* 6 H&N 54 at p 58 (in 1860), *Bell v Midland Railway Company* 10 CB (NS), 287 at p 308 (in 1861), *Dreyfus v Peruvian Guano Co* 42 Ch. D, 66 at p 77 (in 1889), *The Mediana* (1900) AC at p 118, *Anderson v Carlvert* 24 TLR 399 (in 1908), *Smith v Streatfeild* (1913) 3 KB 764 at p 769 (in 1913)).

> Where a defendant with a cynical disregard for the plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk… This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object — perhaps some property which he covets — which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay. (per Lord Devlin at p 1221.) (*McMillan v Singh* (1985) 17 HLR 120)

In *Drane v Evangelou* [1978] 1 WLR 455, the Court of Appeal upheld an award of exemplary damages in a case of eviction by a landlord. In that case, however, the landlord was not convicted of any offence under the Protection From Eviction Act 1977 before the civil action was decided. The present case concerns an award of

A exemplary damages where the landlord had been convicted and fined under the 1977 Act, and demonstrates that exemplary damages may still properly be awarded in such a case.

The defendant appealed on the grounds:

B (a) that there should have been no additional award of aggravated damages;

(b) that the judge failed to give sufficient regard to the fine and costs which the defendant had been ordered to pay, with the effects (i) that an award of exemplary damages would punish the defendant twice, and (ii) that the judge had failed to observe a distinction between the present case and the C case of *Drane v Evangelou*, and (iii) that the award of £1,000 had been adopted from *Drane v Evangelou* without considering whether it was appropriate in the present case; and

(c) that the judge paid insufficient regard to the defendant's income, and to the fact that he had been granted legal aid with a nil contribution and, in D relation to costs, that the judge had regard to the income of the defendant's son's business.

Held (dismissing the appeal):

(a) there was no basis for interfering with the judge's award of aggravated E damages; the case was about as plain a case for aggravated damages as one would expect to find;

(b) no material had been presented to the court defining or describing the scope of the facts in respect of which the defendant was fined; in the award of exemplary damages, the judge had had regard not only to the initial F eviction but to the fact that the plaintiff had been dispossessed of his belongings, and to the deliberate and unlawful refusal to admit the plaintiff after the injunction was granted; the judge had directed his mind to the fact that the defendant had been fined for the eviction, but there was a great deal more to the conduct which followed the eviction which justified the finding that this was an absolutely outrageous example of persecution by a landlord G of a tenant; there was no basis for suggesting that the judge had been unaware of the distinction between the present case and Drane v Evangelou, or that the amount of £1,000 had been simply plucked from the judgment in Drane v Evangelou and applied to different facts;

(c) the grounds of appeal related to the means of the defendant were without H foundation because the judge found that the defendant had tried to deceive him in what he said about his means, and that the defendant had deceived the legal aid authorities when his means were assessed.

I **[81]** In *Millington v Duffy* (1985) 17 HLR 232 the Court of Appeal said:

In these circumstances, in my judgment, the present case, and any case involving similar tortious behaviour, falls neatly within the principles enunciated by this court in *Drane v Evanglou* [1978] 1 WLR 455, in which it was held that the plaintiff, also a tenant who had been evicted from his premises by what the county court judge

described as the 'monstrous behaviour' of the defendant, was entitled to exemplary damages, assessed in that instance at £1,000. I would refer to a passage in the judgment of Lord Denning at p 459, followed with similar emphasis by Lawton LJ and Goff LJ Lord Denning said:

> Lord Devlin, in *Rooks v Barnard* [1964] AC 1129, 1226, acknowledged that there are some categories of tort in which exemplary damages may still be awarded. This case seems to me to come within the second category. Lord Devlin said, at p 1227: 'This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object — perhaps some property which he covets — which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.' To my mind this category includes cases of unlawful eviction of a tenant. The landlord seeks to gain possession at the expense of the tenant — so as to keep or get a rent higher than that awarded by the rent tribunal — or to get possession from a tenant who is protected by the Rent Acts. So he resorts to harassing tactics. Such conduct can be punished now by the criminal law. But it can also be punished by the civil law by an award of exemplary damages. In the recent case of *236 McCall v Abelesz… it was held that the provisions of the Rent Act 1965 against harassment only created a criminal offence. But I said, at p. 594: 'I see no need to give any new civil remedy for harassment. As I understand it, the law already gives a perfectly good civil action for damages.' So in a case of this kind damages can be awarded not only by way of compensation but also by way of exemplary damages.
>
> Goff LJ, at p 462, also quoted from a further passage in the speech of Lord Devlin: 'Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay,' and I add 'as it is in this case'.
>
> It is conceded that it was within the judge's discretion to award exemplary damages. The objection is that the discretion was exercised (*Mafo v Adams* [1970] 2 WLR 72) *(Guppys (Bridport) Ltd v Brookling, Guppys (Bridport) Ltd v James* (1984) 14 HLR 1).
>
> It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss, proved. (*Rookes v Barnard* [1964] AC 1129, at p 1221).

**[82]** In *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, the House of Lords said:

> The defendant Chief Constable admits the forgery and that the officer's conduct amounts to misfeasance in a public office. He successfully contended, however, that exemplary damages are not recoverable for the tort of misfeasance by a public officer

so that that part of the claim should be struck out. He accepts that there is a viable claim for aggravated damages for such misfeasance.

The parties agree that an award of exemplary damages may be made in appropriate cases in English law even though, being punitive in nature, such an award is inconsistent with the principle that damages are intended to be compensatory. As the law now stands that agreement in my view is well founded.

In *Rookes v Barnard* [1964] AC 1129, 1223 Lord Devlin, with whom on this point other members of the House agreed, having considered early cases concluded:

> These authorities clearly justify the use of the exemplary principle; and for my part I should not wish, even if I felt at liberty to do so, to diminish its use in this type of case where it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power.

Having reviewed further cases he said, at pp 1225–1226:

> These authorities convince me of two things. First, that your Lordships could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not, therefore, conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance they may be said to afford. The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category — I say this with particular reference to the facts of this case — to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service … Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

It is equally accepted by the parties that exemplary damages are not precluded by the fact that aggravated damages may be awarded though it is clear that before the decision of the House in *Rookes v Barnard* [1964] AC 1129 the distinction between

the two was not fully appreciated. In that case Lord Devlin, at p 1228, drew attention to the difference of purpose of compensatory damages and punitive or exemplary damages:

In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.

In *Lavery v Ministry of Defence* [1984] NI 99, in awarding exemplary damages, after citing passages from the speech of Lord Devlin in *Rookes v Barnard* [1964] AC 1129, Kelly LJ said [1984] NI 99, at p 106–107:

'… I ask the question what total sum is sufficient not only to compensate the plaintiff for the assault suffered in all the circumstances, but to teach the defendant that this sort of conduct does not pay and hopefully deter its repetition. I think the conduct of the soldier concerned, some of which was acquiesced in by the other members of the patrol, was a deliberate and unjustifiable abuse of the lawful power to stop and question a citizen. This power is a necessary one, entrusted to the security forces to aid their difficult task of maintaining law and order in the streets of this city and elsewhere throughout the Province. It is a power which at times must be exercised frequently to maintain an efficient standard of peace-keeping. Inevitably it involves confrontation between soldier and citizen and police officer and citizen and a sensitive confrontation at that with the power to stop search and question delicately poised against the rights of the citizen. The lawful exercise of these powers demands moderation and tact on the part of the security forces at all times and when they seek to exercise them in confrontation with unco-operative citizens in hostile and dangerous areas, it demands forbearance and discipline, as well. Nevertheless the security forces must be reminded that these powers which necessarily and lawfully reduce the freedom and privacy of the subject must not be abused. The present case was a blatant and quite unjustified abuse of lawful powers. It should not happen again, the defendants should be told. I do not think that the award of £1,000 by learned county court judge is adequate to include the elements of punishment or deterrence. My conclusion is that a proper award to include exemplary damages, should be £2,500.

In *Pettigrew v Northern Ireland Office* [1990] NI 179, Kelly LJ said in giving judgment, at pp 181–182:

In this case I consider that the conduct of the dog handlers who deliberately did not restrain their dogs from nipping or biting the plaintiff and the conduct of the prison officers who kicked or punched the plaintiff was oppressive conduct by servants of the government. Notwithstanding that the prison officers had real and understandable grounds for anger, it was their duty to restrain that anger, and in my opinion their conduct calls for an award of exemplary damages to mark the disapproval of the court, to teach that such conduct does not pay, and to act as a deterrent against this type of conduct against prisoners being repeated in the future.

Mr Campbell submitted that as the purpose of awarding exemplary damages is to punish a defendant whose conduct was oppressive and in the opinion of the court deserves punishment, exemplary damages should not be awarded against the Northern Ireland Office because it had done nothing deserving of punishment. There could be no suggestion that the Northern Ireland Office connived at or condoned the conduct of the prison officers responsible for the attacks on the plaintiff, and when allegations were made of attacks upon the prisoners the Northern Ireland Office caused an investigation to be carried out. I accept Mr Campbell's submission that there are no grounds upon which exemplary damages could be awarded against the Northern Ireland Office in respect of its own conduct as a government department. But there are a number of decisions in this jurisdiction which make it clear that exemplary damages can be awarded against a defendant where that defendant is vicariously liable for the conduct of its or his servants or agents and the conduct of those servants or agents calls for exemplary damages. These cases are *Lavery v Ministry of Defence* [1984] NI 99, *Walsh v Ministry of Defence* [1985] 4 NIJB and *Hamilton v Chief Constable of the Royal Ulster Constabulary* [1986] 15 NIJB. The same view of the law is implicit in the judgments of the Court of Appeal in England in *Holden v Chief Constable of Lancashire* [1987] QB 380.

In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct.

Trespass, assault and imprisonment; issue joined upon the general issue not guilty, tried before the Lord Chief Justice, when it was proved for the plaintiff that he is a journey-man printer, and was taken into custody by the defendant (a King's messenger) upon suspicion of having printed the North Briton, Number 45; that the plaintiff kept him in custody about six hours, but used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damages; the defendant attempted to justify under the general warrant of a Secretary of State, to apprehend the printers and publishers of the said North Briton, Number 45, (which is before set forth at length in the case of The King and Wilkes, Easter term, 3 Geo 3,) by virtue of the Stat, of Jac 1, and the Stat. 24 Geo 2, cap 44, but was over-ruled by the Lord Chief Justice; whereupon the King's Counsel, who were advocates for the defendant, tendered a bill of exceptions, which has not yet been argued; the jury gave 3001 damages.

These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Charta, Nullus liber homo capiatur vel imprisonetur, &c nee super eum ibimus, &c nisi per legale judicium parium suorum vel per legem terree, &c. which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages against the Solicitor-General's argument. Upon the whole, I am of opinion the damages are not excessive; and that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed

of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.' (*Huckles v Money* 2 WILS KB 206, *Manson v Associated Newspapers Ltd* [1965] 1 WLR 1038, *Benson v Sir Thomas Frederick, Bart* (1766) 3 Burrow 1845)

**[83]** With due respect to learned senior federal counsel whatever force there may or may not be in his submissions and his reservation on the award of exemplary damages, in particular, relying on s 8 of the Civil Law Act 1956 has to be considered on a case by case. The court's discretion should not be limited to s 8 of the Civil Law Act 1956 as this court must be able to apply common law on the factual matrix in the present case to award exemplary damages. As stated above, exemplary damages, are given in cases of 'conscious wrongdoing in contumelious disregard of another's rights' which has been described as vindictive, retributary, punitive (*Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71 at p 77) and the present case is one which fits well in that category.

Lord Devlin in his speech in *Rookes v Barnard* [1964] AC 1129, in his conclusion said:

There are certain categories of cases in which the award of exemplary damages can serve useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal

It is clear that Lord Devlin reference to exemplary damages is a sort of damages referred to by Pratt CJ in *Wilkes v Wood* (1763) Lofft 1 98 ER 489 (KB) at pp 498–99.

Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

**[84]** Therefore, in addition, to the 'monetary amends' in a civil action for damages for tort as provided under s 8 of the Civil Law Act 1956, (but in a broader sense), the court must be able to award exemplary damages for the custodial death caused to the deceased due to the breach of public duty in not protecting the fundamental rights of the deceased while in the police custody where the brutal assault was carried out and grievous injuries inflicted on the deceased under the pretext of intensive interrogation to extract confession. Therefore, damages in the nature of exemplary damages should be awarded against the wrongdoer.

**[85]** If police officers in a police station act mercilessly, torture and cause death to detainees while under detention in lockup or police station, the defendants should be ordered to pay exemplary damages to the claimant or the

family members for the deprivation of life of the deceased at the hands of the police officers. Custodial death is perhaps one of the worst crime in a civilized society governed by the rule of law. If police officers become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself. No civilized nation can permit that to happen as the safety of the people is the supreme law. (*Salus popoli supreme/ lex* — the latin maxim). Public policy demands that police officers who are found guilty and responsible for death in police custody should be ordered to pay exemplary damages. The action of police officers who are involved in interrogation must be right, just and fair as using any form of torture for extorting any kind of information or confession would neither be right nor just or fair, and must be viewed with contempt for being in violation of art 5 of the Federal Constitution.The quantum of exemplary damages will, of course, depend on the peculiar facts of the case and there can be no 'straight jacket formula'.

In *McLoughlin v O'Brian* [1983] 1 AC 410, the court said:

> Their Lordships observed that common law should not remain frozen but should consider in any given case whether it is right to extend and the right to consider what and where new limitations should be placed upon the right to recover damages.
>
> By analogy, the plaintiffs right to claim for exemplary damages and aggravated damages, the court must proceed in the traditional manner of the common law, from case to case, upon the basis of logical necessity to award exemplary and aggravated damages in a given case. The law has advanced and the floodgates must accordingly be opened and court should not be over cautions and have any kind of exaggerated fear.
>
> Law is not a mausoleum. It is not an antique to be taken down, dusted admired and put back on the shelf. It is rather like an old but vigorous tree having its roots in history, yet continuously taking new grafts and putting out new sprouts and occasionally dropping dead wood. It is essentially a social process, the end product of which is justice and hence it must keep on growing and developing with changing social concepts and values. Otherwise, there will be estrangement between law and justice and law will cease to have legitimacy Though 'continuity with the past is a historical necessity', 'conformity is not to be turned into a fetish'. (*Motilal Padampat Sugar Mills v State ofUttar Pradesh and Ors* (1979) AIR 621).

**[86]** In awarding exemplary damages, the court must take into account not only the interests of the deceased and his family and the defendants but also the interests of the public as a whole with the view to ensuring that the public bodies or officials do not act unlawfully and abuse their powers but to carry out their public duties properly and lawfully. (*Nilabati Beraha v State of Orissa and Another* AIR 1993 SC 1960). In this respect, this court must play an important and vital rule in not only preventing and remedying the abuse and misuse of powers but also to eliminate any exploitation and prevent injustice. (*Janata Dal v HS Chowdhary & Ors* AIR 1993 SC 892, AIR 1996 Cal 181 at p 219).

In *Nilabati Behera Alias Lalita Behera v State of Orissa and Another* (1993) AIR 1960, the court said: A

There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. B

The citizen complaining of the infringement of the indefeasable right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the courts exercising writ jurisdiction. C

The primary source of the public law proceedings stems from the prerogative writs and the courts have, therefore, to evolve 'new tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. [608 C] 2.04. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasable rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations. [608 H, 609 A] 2.05. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasable right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasable rights of the citizen. D E

Ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In-these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 'which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violaters in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the state as shield. If Civilisation is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of in-dividuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers F G H I

A It is not our concern at this stage, however, to determine as to which police officer or officers were responsible for the torture and ultimately the death of Suman Behera. That is a matter which shall have to be decided by the competent court.

This is not the task for Parliament the courts must do this. Of all the great tasks that lie ahead this is the greatest.

B

**[87]** On the other hand, even if there is credible evidence that the deceased was a criminal offender and which is based on mere allegations or suspicion or even if it is accepted has having any basis for which there is no evidence before C this court to support the same, it still does not vest the police or any officer in the police force with the power to inflict injuries under any circumstances. In this case, inflicting multiple injuries on the deceased and causing his death, in a manner that had been committed and considering the nature of the injuries and the cause of death, D4 and D5 cannot and should not be allowed to D maneouver to escape liability but must be prepared to accept the legal consequences. Consequently, there is legal obligation on their part to pay all the compensation and damages over and above awarded under ss 7 and 8 of the Civil Law Act 1956. (*Ajab Singh v The State of Uttar Pradesh* AIR 2000 SC 3421). In cases of custodial death which is caused due to the act or omission of E police officers who are responsible for the safety of the detainee in the police lockup or police station, this court is serious and will not condone such inhuman and unprofessional conduct, especially police officers who are responsible and in charge of law and order irrespective of their rank in the police force and this is a true reflection of the independence of judiciary and F not just by providing *'lip service'*.

**[88]** The court's reputation for honesty and impartiality which is important to the judicial oath must be maintained at all times in the discharge of its judicial function notwithstanding the rank of the police officer. This court G cannot and will not perform its judicial function under fear or favour but wholly and solely on the totality of the evidence presented to this court. (*Bala Krishnan Appala Naidu v Ketua Inspektor Prabakaran Shanmugam & 2 Ors (No 2)* [2011] 2 CLJ 890).

H Arthur T Vanderbilt, the Chief Justice of The New Jersey Supreme Court in his series of lectures delivered in the University of Virginia — (see ALJ Vol 28, pp 561–562):

It is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts as it affects I them, their respect for the law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it

The Chief Justice also said:

> Judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the court-room; Judges deeply versed in the mysteries of human nature and adopt in the discovery of the truth in the discordant testimony of fallible human beings; Judges beholden to no man, independent and honest and — equally important — believed by all men to be independent and honest; Judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman and child that may come before them and to preserve individual freedom against any aggression of Government;

**[89]** Be that as it may, learned senior federal counsel sought to sustain the decision of the Court of Appeal in *Borhan bin Hj Daud & 2 Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329 and *Suzana bt Md Aris (claiming as administratrix of the estate and a dependant of Mohd Anuar bin Sharip, deceased) v DSP Ishak bin Hussin & Ors* (Civil Appeal No W-01–402 of 2009), on the basis that the Court of Appeal had reversed the decision and the findings of the High Court in respect of the award of exemplary damages and damages for false imprisonment. With respect to learned senior federal counsel, having read the Grounds of judgment of the Court of Appeal of His Lordship Raus Sharif JCA (as he then was) (now President of the Court of Appeal) a copy of grounds of judgment which was provided by learned counsel for the plaintiff to this court on 7 June 2013 for which this court is thankful, there is absolutely nothing, with respect, where the Court of Appeal had dealt with the issue of quantum, particularly, the award of exemplary damages as correctly submitted by learned counsel for the plaintiff. In *Borhan bin Hj Daud & 2 Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329 the plaintiff's claim for exemplary and aggravated was awarded by the High Court which found liability against the defendants. However, the Court of Appeal on 25 March 2010 had reversed the finding on liability and set aside the whole of the judgment. In this respect, it is important to reproduce the particular paragraph of the judgment of the Court of Appeal which is relevant for the purpose of considering the rival submissions of both learned counsel for the plaintiff and learned senior federal counsel for the defendants which is reproduced:

> In *Borhan bin Hj Daud & 2 lagi v Abd Malek bin Hussin (Civil Appeal No W-01–122-2007)*, His Lordship Raus Sharif JCA (as he then was) (now President of the Court of Appeal) said at para 55:
>
> In our judgment, the findings of facts by learned High Court Judge that respondent had been assaulted or tortured is not supported by evidence. The findings were perverse and cannot be upheld. It must be set-aside. As liability is not established against the appellants, there is no question of awarding damages, be it exemplary, aggravated or otherwise which the respondent sought in the statement of claim.

**[90]** Therefore, from the close reading of the conclusion of the Court of Appeal in *Borhan bin Hj Daud & 2 Ors v Abd Malek bin Hussin* [2010] 6 MLJ

329, the Court of Appeal did not agree with the reasoning of the High Court, with respect, in respect of liability but nothing was said on the findings of the awards of damages which included exemplary damages or that the High Court has no power to award exemplary damages or damages for false imprisonment. The contention of learned senior federal counsel that the Court of Appeal has set aside the award of exemplary damages or damages of false imprisonment in accordance with his submissions that this court has no power to award exemplary damages cannot be sustained and is a misreading of the judgment, and is misplaced. There is nothing in the grounds of judgment of the Court of Appeal to state directly or impliedly that the court cannot award exemplary damages or damages for false imprisonment or misfeasance when there is claim for dependency pursuant to s 7 or a claim under s 8 of the Civil Law Act 1956. At first sight it may be seen as if the Court of Appeal had in fact disagreed with the reasoning of the High Court in awarding the exemplary damages but however on close reading, with respect, it does not appear to be and should not be read in that context or be read into the judgment as intended by learned senior federal counsel. There was absolutely no finding or ratio decidendi of the judgment in the Court of Appeal to say that the award of exemplary damages is not allowed in law. In the circumstances, this court, with respect, would follow the reasoning of the High Court on the award of exemplary damages. (*Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 386 at p 395–396).

**[91]** The function of the law is to enable rights or grievances to be vindicated and of course and naturally to provide remedies whenever a tortious act is committed on them. This court finds that the plaintiff has successfully established the tortious act against the defendants and she has suffered losses as pleaded in the statement of claim. On the factual matrix of the present case, this court wishes to reiterate D1, D2, D3, D4 and D5 cannot by any stretch of the imagination be permitted to disclaim responsibility for the consequences of the tortious act committed by D2 and possibly other officers who are responsible for the deceased's death while he was in the police custody.

**[92]** As for the issues to be tried, the findings of this court are as follows:

(a) Affirmative

(b) Affirmative

(c) Affirmative

(d) Affirmative

(e) Affirmative

(f) Affirmative

**[93]** As for the issues to be tried againt D2, the findings of this court are as follows:

(a) possibly the policemen or officers who had accesss and responsible for the interrogation of the deceased which includes D2.

(b) yes, on 16 January 2009 and there is no evidence that he was solely responsible from the date the deceased was arrested until he died on 20 January 2009.

**[94]** As for the issues to be tried against D1, D3, D4 and D5, the findings of this court are as follows:

(a) negative

(b) affirmative

(c) negative

(d) affirmative except for vindictory damages

**[95]** As to the reliefs claimed under para 35 of the amended statement of claim, the decision of this court is:

(a) damages under s 7 of the Civil Law Act, this court is satisfied that the deceased had contributed the sum of RM1,000 per month to the plaintiff. As the deceased was 23 years old (below 30 yrs) at the time of his death, the multilier is 16 years ( s 7(3)(iv)(d) of the Civil Law Act 1956. (RM1,000 x 12 month x 16 = RM192,000). The plaintiff is awarded the sum of RM192,000.;

(b) damages for funeral expenses under s 7(3)(ii) of the Civil Law Act 1956, the plaintiff is awarded the sum of RM9,700 as agreed;

(c) damages for assault and battery being pain and suffering for the grievious injuries during the period of the deceased's detention until his death on 20 January 2009 the plaintiff is awarded RM50,000. ( s 8 of the Civil Law Act 1956);

(d) damages for false imprisonment for the period of the deceased's detention, the plaintif is awarded the sum of RM100,000;

(e) damages for misfeasance of public office, plaintif is awarded the sum of RM50,000;

(f) aggravated damages, there is no award in view of the award given for exemplary damages;

(g) exemplary damages, the plaintiff is awarded the sum of RM300,000;

(h) there is no award for vindictory damages;

(i) there is no award for special damages. There is no sufficient evidence to support the claim under special damages except for the police report lodged by the plaintiff;

(j) in so far as this case and based on the factual matrix where the interest of justice requires that the plaintif should be able to obtain the declaration, this court is agreeable to grant. The declaration is allowed as it is appropriate on the factual matrixs of this case;

(k) interest is allowed on the judgment sum at the rate of 5%pa from the date this action was filed on 13 January 2012 until satisfaction; and

(l) costs of RM50,000 is awarded to the plaintiff.

**[96]** For easy reference, the damages claimed, submitted by the parties and awarded by this court is summarised as follows:

| No. | Particulars of damages claimed by the plaintiff | Amount claimed by the plaintiff | First, third, fourth and fifth defendant's submissions which were adopted by the second defendant | Award and Decision of this court |
|---|---|---|---|---|
| 1. | Loss of Support | RM1,000 x 12m x 16yrs (multiplier) = RM192,000 | RM300 (based on 1/3 from RM1,000) x 12m x 16yrs (multiplier) = RM57,600.00 | RM1,000 x12m x 16yrs (multiplier) = RM192,000 |
| 2. | Funeral Expenses | RM9,702.70 | As agreed RM9,702.70 | RM9,700 |
| 3. | Pain and Suffering | RM10m | The amount should be around RM10,000.00 | RM50,000 |
| 4. | Assault and Battery | RM10m | Not entitled | RM50,000 |
| 5. | False imprisonment | RM500,000 | Not entitled | RM100,000. |
| 6. | Misfeasance of Public Office | RM10m | Not entitled | RM100,000 |
| 7. | Aggravated damages | RM500,000 | Not entitled | No award |
| 8. | Exemplary damages | RM10m | Not entitled | RM300.000 |
| 9. | Vindicatory damages | RM10m | Not entitled | No award |
| 10. | Special damages | | Not proved | No award (not proved) |

| | | | | |
|---|---|---|---|---|
| TOTAL | RM801,700 | | | |
| 11. | Costs | RM300,000 | First, third, fourth and fifth defendants = RM20,000, Second defendant =RM30,000 | RM50,000 |

**[97]** Before concluding, this court should, perhaps, add a few words on the recommendations of the Royal Commission for Police Reform. There is an urgent need to seriously consider implementing the proposals, particularly the Independent Police Complaint and Misconduct Commission (IPCMC) in respect of discipline of police due to the sharp rise in custodial violence, torture and death in police custody so that it could be incorporated as law. There is also justification for the urgency to protect the interest of arrested persons who are taken into police custody. Police officers, being custodian of law and safety of the public and the nation as a whole are to protect the detainees and not to abduct by abusing their statutory powers which would deprecate the liberties guaranteed by the constitution. Therefore, if there is an abuse of power by certain police officer and if his unlawful act is not checked and a long arm of law fails to apprehend them, the belief of those police officers will forever be reinforced that no harm can be caused to them by any authority, in which event, the people will loose faith in the prevailing law as well as the enforcing machinery. (*Siddhu v State of UP* (2002) Cri LJ 4546 at p 4549). In fact, it is desirable as well as in the interest of justice to entrust the entire investigation whenever there are incidents of custodial deaths or torture in police custody or other abuse of powers by police officers to an independent agency forthwith, if possible, as recommended by the Royal Commission. The recommendation of the Royal Commission should not be kept in 'cold storage' and continue to freez but must be activated or implemented as soon as possible in order to ensure that all concern members of society including the family members of deceased person or victims may feel, assured that the independent agency is looking into the matter without any influence imposed by the local police officers. It is important to state, with respect, that howsoever dutifully or faithfully the local police officers may carry out the investigation against disciplinary offences committed by police officers, the same will lack credibility since the allegations are against their own officers or colleague. The power to investigate allegations against police officers, particularly, custodial torture or death must be exercised with great care, caution and circumspection so as not to affect its efficiency, reliability and transparency and so as to eliminate any suspicion that some kind of influence is being exerted by the police officers or the police authority. There is an urgent need for such commission which has been clearly stated, namely:

Independent Police Complaints and Misconduct Commission (IPCMC)

This is the proposed external oversight body to be established pursuant to an Act of Parliament vested with the powers to receive and investigate complaints regarding alleged police misconduct and to impose sanctions against those found guilty of any misconduct. The need for such an external discipline mechanism is clearly borne out by the commission's observation at p 122 that:

…When officers act in contravention of laws and regulations without fear of investigation or reprimand, the culture of impunity begins to develop. Each wrongdoing that is not investigated or punished or is supported by higher ranks within the police leadership, leads to the perception that such misconduct is permissible. As each new generation of officers observes and learns from their superiors, the culture becomes embedded in all the ranks of the PDRM.

**[98]** As stated above, there is a real grievance, the recommendation by the Royal Commission for improvement, particular the IPCMC should no longer remain in 'cold storage' so that the time and money spend on the setting up of the Commission and the production of the report will be put to public good being for the greater good of the society and trust and to assure credibility to the action, to discipline and improve accountability so that 'the rest would follow, as day follows the night' and the credibility of the rule of law will not deteriorate It is important to be reminded that 'where there is will, there is way'. 'Will there is way would be found'. The enforcement of an independent body to investigate accusation or disciplinary offences by police officers will eliminate accusations of *'horror stories'* in some lockups and police stations, where detainees are subjected to various forms of torture and physical ill treatment by some officers under the pretext of intensive interogation which is a continuous act, as in the present case, until death occurs. Custodial death should not become the rule of the day. It is heinous crime perpetrated by the custodians of law. If custodians of the law themselves indulged in committing such crimes then no part of the society is safe and secured. (*Ghotovi Sema v State of Nagaland and Ors* (1996) ACJ 996).

**[99]** In the circumstances, perhaps it is timely that the recommendation of the Royal Commission be implemented as soon as possible and within the context of the issues in the present case as the public and the close family members of victim deceased seems to have little confidents in the investigation carried out by police officers within the institution, no matter how honest and objective the investigation is carried out. In this context, with respect, it is only appropriate to state that it is not for the officers within the institution to decide whether to accept or reject the recommendation of the Royal Commission in reference to disciplinary matters committed by police officers as it involve the issue of impartiality and independence of the investigation tribunal as 'no man can be a judge of his own course'. The officers in the institution, with respect, cannot be expected, at least in the eyes of the public to be impartial, especially,

when the investigation which is expected to be carried out in respect of custodial death may in some cases implicate the state or district police chief or even the directors of certain divisions in the institution. Therefore, it is only appropriate, with respect, and for the confidence in the investigation to be enhanced, if the investigation related to disciplinary enquiry which concerns police officers is conducted by an independent investigation agency.

> A fair enquiry and a fair decision are both closely interlinked and neither one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases is bound to lead to the sacrifice of the other (*Krishna Murthy v Abdul Subban* [1965] 1 Cr LJ 565 at p 576).
>
> No man can be a judge in his own course governs the law on the concept of impartiality of justice and is an intrinsic requirement of the administration of justice and is equally applicable to a decision making process by an investigation or disciplinary tribunal or agency especially when it is related to custodial death. The decision of bias of the tribunal or impartiality on the part of the adjudicating authority would be regarded as a nullity and the inquest coram non judis (*Vassiliades v Vassiliades* AIR 1945 PC 38). In order to secure justice is done, the idea of justice contemplates at least an independent impartial and non partisan judge who will act fairly, justly, reasonably and impartially (*Sazali bin Abdullah v Ketua Polis Negeri Perak & Ors* [2009] 2 MLJ 370 at p 381–383). Due process is that which comport with the deepest notions of what is fair and right and just (*Solevee v Balkom* 330; US 9 (1950)).

**[100]** In the circumstances, and in accordance with the rules of reason and justice, the plaintiff's claim against all the defendants is allowed. Damages is awarded with costs as above.

*Plaintiff's claim allowed.*

Reported by Kanesh Sundrum